119-643

# TRANSCRIPT OF RECORD.

## SUPREME COURT OF THE UNITED STATES.

**OCTOBER TERM, 1883.**

No. 315. 71

ALBERT BALDWIN, SUBROGATED FOR JOSEPH C. KEYSER, APPELLANT,

*vs.*

JOHN W. BLACK.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF LOUISIANA.

**FILED OCTOBER 1, 1883.**

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APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF LOUISIANA.

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1 UNITED STATES OF AMERICA:

Circuit Court of the United States in and for the Fifth Judicial Circuit and Eastern District of Louisiana.

JOSEPH C. KEYSER
*vs.*
JOHN W. BLACK
} No. 10055.

*Transcript of No.* 11242 *from the District Court of the United States for the Eastern District of Louisiana. Filed October 24th*, 1882.

JOS. C. KEYSER
*vs.*
JOHN W. BLACK.
} 11242.

Libel. Filed May 7th, 1878.

To the Hon'b'l- Edward C. Billings, judge of the district court of the U. S. for the district of Louisiana:

2 Joseph C. Keyser, of the city of New Orleans, in the State and district of Louisiana, exhibits this his libel against John W. Black, also of said city, State, and district, in a cause of implied contract civil and maratime, and thereupon the said libellant articulately alleges and propounds as follows, to wit:

1st. That from, say, the month of January, 1874, up to the 6th day of May, 1878, the libelant was the sole owner of the steam-tug called the C. C. Keyser, a vessel staunch and strong and specially built for the business of towing vessels measuring about 100 feet in length and having a measurement of about $104\frac{96}{100}$ tons, fully equipped with engines, boilers, machinery, tackle, apparel, and furniture, and fitted in every respect for the business of towing vessels, and for which purpose the libelant has caused said steam-tug to be built.

2nd. That from, say, the month of January, 1876, up to, say, the 12th day of October, 1877, the libelant was in the business of towing vessels with the said steamtug C. C. Keyser, in and about the harbor of New Orleans and on the Mississippi river, between said city of New Orleans and the mouth of said river, for hire.

3 3rd. That on said 12th of October, 1877, Neafie and Levy, a commercial firm doing business in Philadelphia, in the State of Pennsylvania, being the holders of a mortgage against said vessel, brought suit in the honorable the 3rd district court for the parish of Orleans, in the cause entitled Neafie & Levy *vs.* Joseph C. Keyser, and numbered 24865 of the docket of said court, and obtained a writ of sequestration therein, and thereunder caused the civil sheriff of the parish of Orleans to seize and take into his custody the said steamtug, her tackle, apparel, and furniture, and the same to hold until, say, the — day of said month of October, 1877, when the said steamtug was, on the application of said Neafie and Levy, through counsel representing them in said cause, released on bond.

4. That at once, upon being released on bond, as stated in the 3rd article of this libel, the said John W. Black took possession of said steamtug, though he had no lawful right so to do, and at once with said steamtug engaged in the towing trade in the navigable waters of the Mississippi river in and about the harbor of New Or-
4 leans, and in said river between said city and the mouths of said river, for hire, though he had no lawful right so to do.

That the services to which the said steamtug was put by said John W. Black were of the severest kind, and such as would and did cause extraordinary tear and damage and destruction to said tug, and were services and use of great value. That the said Black has continued to so use said vessel up to some time in the month of Feb'y or March, 1878, the libellant not being able to fix the exact date at which said Black ceased to employ said steamtug in said towing business; that the effect of said employment was greatly to deteriorate the actual value of said steamtug, and was greatly to her injury and to the injury of the libelant.

5. That the value of the use and services of said steamtug, as made use of by said Jno. W. Black for his own behoof and benefit, is fully the sum of $25,000, and the said Black, by taking possession of and using said steamtug, as related in the several articles of this libel, has become and is liable to the libel-ant for said sum, as in
5 an implied contract, and that said Black refuses to pay said sum to libelant, though in law and justice bound so to do.

6th. That all and singular the premises are true and within the maritime and admiralty jurisdiction of this hon. court.

Wherefore the libellant prays that said John W. Black may be cited to appear and answer the matters aforesaid, and may be decreed to pay to the libelant his aforesaid demand, with costs, and that the libel-ant may have such other and further relief as he may be entitled to receive and the court be competent to give.

JOSEPH C. KEYSER.

CH'S S. RICE,
*Of Counsel.*

*Citation. Issued May 7th,* 1878.

The President of the United States of America to the marshal of the district of Louisiana, Greeting:

You are hereby commanded to summon John W. Black to
6 comply with the demand of Joseph C. Keyser, contained in the libel, of which a copy accompanies this citation, or to deliver his answer to the same in the office of the clerk of the district court of the United States of America for the district of Louisiana, holding sessions in the city of New Orleans, in ten days after the service hereof, or judgment will be rendered against him by default, which delay is increased one day for every ten miles the defendant's residence is distant from New Orleans, the place where the court is held, and that you make due return hereof on the 4th Monday of May, 1878.

Witness the Honorable Edward C. Billings, judge of the said court, at the city of New Orleans, this 7th day of May, A. D. one thousand eight hundred and seventy-eight.

[SEAL.] R. DEVONSHIRE,
*D'y Clerk.*

*Marshal's Return.*

Received this 8th day of May, 1878, and on the 9th day of May, 1878, served copies of the within citation and accompanying petition on the within-named John W. Black by handing the same
7 to him in person in the city of New Orleans.

W. G. ELLIOTT,
*D'y Marshal.*

*Exception and Answer. Filed May 27th*, 1878.

J. C. KEYSER
*vs.* } 11242.
J. W. BLACK.

Now comes John W. Black, the defendant herein, and pleads and excepts to this suit and to the jurisdiction of this court to take cognizance of the same for this, to wit:

That on the 11th October, 1877, Neafie & Levy, of Philadelphia, in Pennsylvania, instituted suit against Joseph C. Keyser to recover $18,164.77, secured by mortgage upon the steamtug C. C. Keyser, and to seize and sell said tug to pay said debt due by said Keyser; that a writ of sequestration was issued in said suit, and said tug was seized and taken into possession by the sheriff; that thereafter, to wit, on or about the 25th October, 1877, the said tug was released from said sequestration to Neafie & Levy, upon their executing the usual release bond with this defendant as their surety, and upon said release this defendant, acting for and on behalf of said
8 Neafie and Levy, received and held possession of the said tug from, say, 25th October, 1877, to about Jan'y 5th, 1878, under said release and bond, and used said tug during said period, all of which was fully recognized and approved of by said Neafie & Levy, and the lawful possession and use of said tug during said period being conferred upon and vested in the said Neafie & Levy, and in this defendant, as their agent, by virtue of the said order of release of the 3rd district court and the execution of said release bond, and that about the 5th Jan'y 1878, said tug was delivered back into the custody of the sheriff, under the orders of said court, to await the sale under the judgment in said suit; that final judgment was recovered in said suit in the third district court on the 16th March, 1878, against said Keyser, in favor of said Neafie and Levy, for $18,164.77, with interest from Sept., 1877, and costs, with right of mortgage aforesaid upon said tug, under which judgment and execution issued thereon, said tug was sold by the sheriff, and adjudicated to said Neafie and Levy for $16,075, who com-
9 plied with said adjudication and became owners of said tug hitherto held by them, and the defendant for them, under

said order of release; and this defendant shows that said seizure under said writ, said order of release to Neafie and Levy, and execution of a release bond, was a complete divesture of the rights of said Keyser to the possession and use of said tug, and conferred the same upon said Neafie and Levy and upon this defendant, holding for them, and said Keyser has no right of action whatever for or in respect to the use of said tug, or to claim pretended damages for said use or possession during said period, and this hon. court has no right to call in question the use and possession of said tug exercised by virtue of the order of said third district court rendered in said suit, of which it had full and complete jurisdiction, but said order and final judgment aforesaid constitute a bar to the demand of libelant.

2nd. That in said suit in the 3rd district court there was judgment preliminary to the final judgment against said Keyser,
10 rendered upon the rule taken by him, which judgment mentioned said sequestration, and rejected his demand to dissolve the same, which judgment was of date Jan'y, 1878, and also concludes said Keyser from his present demand.

And this defendant annexes for reference and fuller explanation the various orders, writs, and the judgment of the said third district court, and the sheriff's deed of sale of said tug to Neafie and Levy, therein referred to, which he prays may be taken as part hereof.

3. That this hon. court has no jurisdiction of the alleged cause of action, based upon an alleged illegal possession of said tug.

And this defendant prays that these exceptions be maintained and that the libel be dismissed.

Should these exceptions be overruled, then this defendant, for answer to the libel, avers and says:

1st. That the libelant was the owner of said tug on the 11th Oct., 1877, and had been for some time previous, subject to the mortgage in the form used in Pennsylvania in favor of Neafie and
11 Levy, copy whereof is herewith filed as part hereof; but this defendant avers that the right of possession of said tug of said Keyser was divested on or about the 11th October, 1877, by said seizure under said writ of sequestration; that subsequently, to wit, on the 25th Oct'r, said right of possession and right of use of said tug was vested in Neafie and Levy and in this defendant, who held said possession and exercised said use for them by virtue of the order of release of said third district court and release bond hereinbefore referred to, and the full ownership passed to said Neafie and Levy by the sheriff's sale aforesaid, all of which more fully appears by the exhibits herewith filed as part hereof, and this defendant believes that the equipment and measurement of said tug is as stated in the first article of said libel.

2. That as stated in the 2nd article of said libel said libelant was engaged in the business of towing part of the time.

3. That it is true that Neafie and Levy did institute suit upon the mortgage, copy whereof is annexed, in the 3rd district court
12 for the parish of Orelans; that the tug C. C. Keyser was seized under the writ of sequestration therein issued, and was

released on bond to said Neafie and Levy, as already stated, on the 25th October, 1877.

4. That as to the matters and things in the 4th article of said libel contained, the same are in great part untrue, and the facts are as follows—that is to say: That this defendant, with a view to secure to Neafie and Levy the release to them of said tug C. C. Keyser, seized under the writ of sequestration in their said suit against said Keyser, consented to become surety on said bond of release; that upon said release this defendant, acting for and on behalf of the said Neafie and Levy, received the delivery of the said tug from the sheriff and held possession of and used said tug for and on behalf of Neafie and Levy, under said order of court, release, and release bond from, say, 25th October, 1877, until about the 5th January, 1878, as the said Neafie and Levy and this defendant, acting for them, had the right to do under said order and release bond; that
13 this defendant's possession and use of said tug was fully recognized and approved by said Neafie and Levy, and the earnings of said tug during said period are the property of said Neafie and Levy, accounts of which have been rendered to and accepted by them and have passed into account between them and this defendant, and the account of said earnings have been received by said Neafie and Levy, and said Keyser has no claim to said earnings or any right of action for or in respect to the use and possession of said tug while she was held under such release bond, or for any period thereafter or before. This defendant denies that the services of said tug *was* of an unusual kind, or that she was subjected to any extraordinary wear and tear, or that she was damaged in any manner by said use, or that the libelant sustained any injury; that her net earnings during said period did not exceed $1,500, which was the full value of said use during said period of her, from 25th October, '77, to about 5th January, 1878, and accrued to the benefit of Neafie and Levy; and this defendant shows that holding the
14 possession of and using said tug for and on behalf of Neafie and Levy, entitled to hold the same under said order of release, his possession and use was lawful and proper; that no improper use of said tug was made, and the tug was preserved to meet the final judgment in said suit, which was in favor of Neafie and Levy themselves.

5th. This defendant avers that the tug was heavily burdened with lien and privileged debts having preference over that due to Neafie and Levy, all of which debts they were compelled to pay, for their own protection and — of their mortgage, and did pay, as mortgage creditors interested in discharging them; that said privileged debts paid by Neafie and Levy amounted to upward of $3,500, for all of which said Keyser was bound; that the amount of said final judgment, with costs and interest, against said Keyser amounted to upwards of $19,000.

That the said Keyser is still a large debtor to Neafie and Levy on account of said mortgage debt and said privileged debts paid
15 by them, they being subrogated to the rights of the creditors holding said privileged debts against said Keyser and said

tug, and that the full value of the use of said tug and her earnings during the period she was held by defendant for Neafie and Levy did not exceed $1,500, much less than the amount still due to said Neafie and Levy for the privileged debts said by them shown by Exhibit B, herewith filed, and the residue of their debt left unsatisfied by the sale under said mortgage; and this defendant denies that there is any contract or obligation, whether implied or otherwise, on the part of this defendant to said Keyser, or that he has claim or shadow of claims in the premises, but the right by which this respondent held and used said tug as hereinbefore stated, and he denies that he held or used said tug for his use or benefit, but for and on account of Neafie and Levy, as they, and he for them, had the right to do under said released bond.

That all and singular the premises are true.

Wherefore this defendant prays that this hon. court will
16 pronounce against the demand of the libelant, and decree the same be dismissed at libelant's costs.

JOHN W. BLACK.

Sworn to and subscribed before me May 27th, 1878.

K. LOEW,
*U. S. Com'r.*

HENRY C. MILLER,
*Proctor for Def't.*

*Submission on Exceptions.*

Exception fixed and continued from time to time till November 21st, 1879, when the same came on to be heard, and after argument of proctors on both sides the court took time to consider.

*Order Cumulating Exception with the Merits. November 22nd, 1879.*

J. C. KEYSER
*vs.* } 11242.
J. W. BLACK.

On due consideration of exception and argument by counsel it is ordered that said exception be cumulated with the answer and tried with the merits.

17 *Supplemental Answer. Filed April 14th, 1880.*

J. C. KEYSER
*vs.* } 11242.
JOHN W. BLACK.

This defendant, John W. Black, not waiving, but insisting upon, the exception to the jurisdiction and all other exceptions herein pleaded, and upon all the defences already urged, but as supplemental and additional thereto, avers and says that during the period prior to the issue of the writ of sequestration by Neafie and Levy of the steamtug C. C. Keyser, during which the libelant had em-

ployed said tug in the business of towing vessels on the Mississippi river, there had been contracted by him for supplies requisite and proper to enable said tug to prosecute said business, and for the wages of the master and crew of said tug engaged on her, the debts following, all due by the libelant at the time of the seizure of said tug under said sequestration and all secured by privileges on
18 her, to wit: To B. D. Wood & Bros., for coal furnished said tug from 5th May to 20th October, 1876, $2,281.40, which, with interest and costs, was paid by Neafie and Levy on the 10th April, 1879, except $500 thereof, paid on the 18th November, 1877, for which amount said B. D. Wood and Bros. had recovered a decree against said tug in the suit of B. D. Wood & Bros. *vs.* Steamtug C. C. Keyser, No. 11134 of the U. S. district, specially referred to for fuller explanation and greater certainty.

To Geo. W. Adams & *als*, master and mariners of said tug, whose names and all necessary particulars are set forth in the petition hereto annexed, marked A, for services on said tug, the sum of $971.62.

To Woodward and Wight, for supplies furnished said tug, the sum of $944.15, furnished said tug on the 6th August, 1877; supplies of ship's stores.

To Brown and Jones, for coal furnished said tug on the 8th October, 1877, *for coal*, $291.

That the privileges securing said debts were all paramount and superior to the mortgage of Neafie and Levy, under which
19 said tug was sequestered and sold; that all of said debts were paid by said Neafie and Levy, as follows: To B. D. Wood & Bro., on 15th November, 1877, and 10th October, 1879; to Geo. W. Adams & *al.* on the 10th January, 1878; to Woodward & Wight on the 5th November, 1877; to Brown & Jones on the 8th October, 1877.

That by the effect of said payments, as well as by express agreement, said Neafie and Levy became creditors of said J. C. Keyser, by whom said debts were due, for the amount of said payment, aggregating $4,488.37, and became subrogated to all the rights and privileges of the creditors, to whom said payments were made—all of which more fully appears by reference to the bills and receipts herewith filed as part hereof and marked 1, 2, 3, & 4.

Defendant further shows that the net proceeds derived by Neafie and Levy, under their execution against said J. C. Keyser, from the sale and adjudication to them of said tug, were $15,383, which, applied as a credit of the judgment of Neafie and Levy against said Keyser, left due to Neafie and Levy on said judgment the sum of $3,387, with five per cent. interest thereon from the 6th May, 1878, the date of the sale and adjudication of said tug under said
20 execution—all of which more fully appears by reference to the return on said writ of execution, herewith filed and made part hereof. That the residue of said judgment left unsatisfied, together with the amount of said privileged debts paid by said Neafie and Levy aggregated $7,875.37, the indebtedness to Neafie and Levy of said Keyser existing at the date aforesaid.

This defendant, further answering, shows that during the period said tug was in defendant's possession, as agent of Neafie and Levy under said release bond, she was only actually used up to, say, the 25th December, 1877; that Neafie and Levy derived from the use of the tug for the time she was held under said release bond the following sums: $1,422 on 20th February, 1878; 832 on 14th March, 1879, and 332 on 8th June, 1878, all of said sums having become due within said period she was held under said release bond; that these sums were not all for actual services performed by the tug, but a portion thereof was an allowance made for the tug by the
21 Towboat Association, in which she was placed by defendant as an agent of Neafie and Levy, under the rules of which association each boat was entitled to draw from the joint earnings of all the boats whether employed or not; and defendant shows that said sums constituted all the earnings and profits of said tug and derived from her use during the period he held possession of her, and, save as agent for his said principals and as surety upon their release bond, he had no relations to said tug.

The defendant further shows that said amount, $2,586, actually derived by Neafie and Levy through this defendant, their agent, was in excess of the actual value of the use, possession, and services of said tug for the whole period she was held in defendant's possession, and was in excess of any amount possible to have been obtained for such use, possession, and services, and if any liability to the libelant ever existed for or in respect to said use, possession, and services during defendant's possession, which liability defendant denies, it was the liability of said Neafie and Levy and not of this
22 defendant, did not exceed said $2,586, and was extinguished as soon as it arose, and at and prior to the institution of this suit by the like amount of said greater indebtedness herein set forth due and owing by said libelant to Neafie and Levy, leaving them still his creditors for the large excess of their said indebtedness of libelants to them over and above the value of said use, possession, and services of said tug, as herein stated, and defendant — to and claims it shall be so decreed if it so deemed that the libelant ever had any demand for or in respect to the use, possession, or services of said tug during the period of defendant's holding her, which defendant again denies, held, as that possession was, as agent of said Neafie and Levy under said release bond, which conferred on them the right to use said tug, and to all that could be derived therefrom, to the exclusion of any claim on the part of the libelant.

Wherefore this defendant prays leave to file this amended answer and for the decree in his favor as prayed for in his original answer.

J. W. BLACK.

23 Sworn to and subscribed before me this 13th April, 1880.

J. DEVONSHIRE,
*U. S. Com'r.*

HENRY C. MILLER,
BRANCK K. MILLER,
*Proctors for Def't.*

*Order.*

Let this supplemental answer be filed.
April 22nd, 1880.

EDWARD C. BIHNGS, *Judge.*

*Transfer. Filed April 1st*, 1880.

PENSACOLA, FLA., *25th November*, 1879.

For valuable consideration I hereby transfer and assign and set over unto A. Baldwin and J. Levi & Co., in undivided halves, all my right, title, interest, and demand in and to the suit entitled Joseph C. Keyser *vs.* John W. Black, now pending as suit No. 11242 of the docket of the district court of the U. S. for the district of Louisiana, subrogating them and each of them to all my rights and actions in the premises.

24 This transfer subject to claims of proctor in cause for his fees.

JOSEPH C. KEYSER.

*Order Subrogating A. Baldwin and J. Levy and Co. Entered April 1st*, 1880.

JOS. C. KEYSER
*vs.*
JNO. W. BLACK. } 11242.

On motion of Ch's S. Rice, proctor for libelant, and on exhibiting to the court and filing the written transfer and assignment by the libelant unto A. Baldwin and J. Levi & Co., in undivided halves, of all his, said libelant's, right, title, interest, and demand in above-entitled and numbered cause, and the subrogation to them of his rights and actions in the premises, said transfer, as shown, being subject to the right of said libelant's proctor's claim for his fees, it is ordered by the court that said act of transfer and subrogation be filed; that said A. Baldwin and J. Levi & Co. be recog-

25 nized as transferees and subrogees to all the rights and actions of libelant, and that notice thereof be given to the respondent.

Served on defendant same day.

E. S. CURRY,
*D'y U. S. Marshal.*

*Hearing and Submission. April 23rd*, 1880.

J. C. KEYSER
*vs.*
J. W. BLACK. } 11242.

This cause came on for trial.

C. S. RICE,
*For Libelant.*
H. C. MILLER,
*For Respondent.*

And after hearing the pleadings, evidence, and argument, the court took time to consider with leave to counsel to submit briefs within ten days.

*Decree for Libelant and Order to take an Account of the Earnings of the Tug. June 8th, 1881.*

JOSEPH C. KEYSER
*vs.*
JNO. W. BLACK. } 11242.

26 This cause came on to be heard at a previous term, and was argued by counsel.

On consideration thereof the court finds the issues for libelant and doth order that an account be taken of the earnings of the tug, C. C. Keyser, while in possession of respondent, and that a statement be made of all liens which rested against the vessel, when respondent took possession of her, and which were extinguished by him.

*Petition for Rehearing. Filed June 14th, 1881.*

U. S. District Court.

JOSEPH C. KEYSER
*vs.*
JOHN W. BLACK. } No. 11242.

Petition for rehearing.

The strong conviction that the decree in the suit of J. C. Keyser *vs.* John W. Black is at variance with the facts and the law applicable to the controversy prompts this application for a rehearing.

The connection of the defendant, Black, with the subject
27 of this suit grew out of his agency for Neafie & Levy. If he is to be condemned it must be for some act done in the course of that agency. It was at their suit, to recover their debt, to enforce their mortgage, that the tug Keyser was sequestered. It was their bond he signed as surety to obtain the sequestration. The tug was released to them as plaintiffs in that suit, the defendant in sequestration having failed to bond. He signed the release bond for Neafie and Levy as principals, and for them he received and held the tug released from the sequestration by the bond furnished. It was for his principals, Neafie and Levy, that he used the tug while held under the release bond, accounting to them for the earnings derived from that use. If this defendant, then, is to be held liable to this libelant, it must be for some matter or thing with respect to this tug, which neither he or his principals had the right to do.

What is the ground of complaint against this defendant charged in the libel? The libel charges the possession and use of the tug while held under the release furnished in the sequestration suit was unlawful and tortious.

28 But it has been adjudged by a competent court, the only court clothed with jurisdiction in the premises, that Neafie

and Levy had the right to seize the tug and to bond the tug. Their suit, in which they sequestered and bonded the tug, was determined in their favor. The title by which they sequestered, *i. e.*, mortgage creditors, was sustained by the final judgment of the 3d district court. The bond furnished in that suit was for the restoration of the tug, if condemned to restore her to defendant in that suit, the libelant here. (Code of Practice, art. 280.) They were not condemned to restore the tug. The defendant's possession was divested by the order of release and release bond, and by the sheriff's sale of the tug under the final judgment and execution. There has been no moment of time since the release of this tug from the sequestration that the libelant here had the vestige of a title to the use or possession of that tug, for the use of which, while held under the title conferred by the order of release of a competent court, this court now awards him damages. (See 6th Ann., 226.)

29 There is a contrast between the right to sequester the property, to bond the property, and to hold the property, finally adjudicated against the libelant by the 3rd district court, and the decree of this court, which gives to the libelant damages for the use of the tug while held by defendants, under the order of the 3rd district court and under the release bond, executed in accordance with that order, that it is believed will impress this court upon the re-examination now asked for, and secure the rehearing and setting aside of the present decree.

With the right to bond and hold the tug, adjudged in the defendant's favor, can it be maintained that they or their agent, the defendant in this case, can be made liable for damages for using the tug while held under the release bond? The very terms of the article of the Code of Practice under which sequestration property is released and the conditions of the bond recognize the right to use property released from sequestration.

It is against an improper use that the article of the Code and the bond provide. C. P., Art., 280. Is it to be supposed that the

30 law requires that the defendant in sequestration, to whom a steam vessel is delivered under his release bond, is to lay the vessel up, subject to the expense and depreciating influence incident to the vessel "lying idle by the wall?" Is it to be maintained that the law prohibits any use whatever of a steamer held under a release-bond, and that if used the party is to pay damages to the other? It is submitted that is not the law. The record shows no improper use of the vessel. To what use could she be put, if used at all, different or other than that to which she was devoted during the brief period she was held under the release bond? It is submitted the right to use the tug followed as an incident to the right to bond, hold possession, and sell the tug for their debt, finally adjudged in favor of Neafie and Levy and against the libelant. His title to the tug, as against his creditors, Neafie and Levy, was not sustained. They were not decreed to restore her to him.

They have held continuously under the release bond, sheriff's sale, and title. What conceivable title has the libelant to

31 to call upon his judgment creditors or upon their agent,

Black, to pay him damages for use or possession of a tug held by them under the order and decree of a competent court, rendered contradictorily with and binding upon him? Under the decree of this court he recovers damages for that use and possession against the agent of his judgment creditors, when the libelant is still their debtor, for the debt unsatisfied by the sale of the tug, for the use of which his damages are awarded, and the libelant recovers these damages necessarily on the theory that his ground of action against the agent of his judgment creditors was supplied to him by some incident in the sequestration suit. But what was done in that suit with respect to this tug by Neafie and Levy or their agent, the defendant, apart from the enforcement of a just debt by the appropriate remedies, and the exercise of lawful rights adjudged to Neafie and Levy against the libelant in this suit?

The merits of the case are with the defendant. It is submitted, too, that there is no jurisdiction in this court of this contro-
32 versy. As Black, the defendant, was simply an agent for Neafie and Levy, the question is, whether the possession obtained under an order of a competent court — whether or not the right to use the tug existed pending that possession — can be described as an unlawful possession in the nature of a maritime tort, or violation of any right of which an admiralty court can take cognizance. If Black's possession of the tug was not obtained by any maritime trespass or wrong, but was lawful in its origin, it it not easy to see how the possession of the tug held under the release bond became unlawful because use was made of the tug. If it can be maintained that the party to whom in a sequestration suit a steamer is delivered on his release bond cannot consistently with the law and his bond use the steamer while held under the release bond, still it would not follow that the admiralty would have jurisdiction to exact compensation for damages.

The court is earnestly asked to re-examine this case. It is
33 believed that on that re-examination the court will plainly perceive the decree cannot stand.

Respectfully submitted,

MILLER, FINNEY & MILLER,
*Proctors for Def'dt.*

*Order Refusing Rehearing. June 15th, 1881.*

Upon due consideration of the petition for a rehearing the court, perceiving no reasons to disturb the decree of the 8th inst., ordered that a rehearing be refused.

*Commissioner's Report. Filed March 17, 1882.*

J. C. KEYSER
*vs.*
J. W. BLACK. } 11242.

On the 8th day of June, 1881, this hon. court rendered the following decree in the above-entitled and numbered cause, viz:

This cause came on to be heard at a previous term and was argued by counsel. On consideration whereof the court finds the
34 issues for libelant and doth order that an account be taken of the earnings of the steamtug C. C. Keyser while in possession of respondent, and that a statement be made of all liens which rested against the vessel when respondent took possession of her and which were extinguised by him.

Believing that a resumé of the facts connected with this cause is necessary to fully and satisfactorily explain the subject-matter of this reference, I have compiled the same and they are as follows, viz:

From the month of January, 1874, to October, 1877, the tug C. C. Keyser, owned by Joseph C. Keyser, was engaged in the towing business.

That on or about the 12th October, 1877, the said tug was seized by virtue of a writ of sequestration issued out of the honorable the third district court for the parish of Orleans at the suit of Neafie and Levy, mortgage creditors, claiming $18,164.17 and interest.

That Joseph C. Keyser, having failed to bond said tug, the defendant, J. W. Black, who claims to be acting as the agent of the seizing creditors above named, effected the release of said tug
35 by bonding the same on or about the 26th October, '77. That on or about the 28th October, 1877, she was placed by said Black in the towing business in connection with the tugs Mary Lee and Greyhound and under his management.

That she was so engaged until December 29, 1877, or thereabouts, when she was laid up, and remained so laid up until the 10th January, 1878, when she was returned to the custody of the sheriff, January 10th, 1878, and was sold by the sheriff on the 6th May, 1878, after all legal delays in the judgment obtained by Neafie and Levy against Joseph C. Keyser for the amount hereinbefore claimed. It further appears that from the 28th October, 1877, to 1 December, 1877, the tug Keyser, as heretofore stated, was engaged in the towing business in conjunction with the tugs Mary Lee and Greyhound, under the management of Black. That on or about the latter date the towboats of the port of New Orleans became part of an association know- as the Towboat Association. That the earnings of the different tugs were pooled, and their disbursements charged *pro rata* to their different representative interests, and that the tugs
36 hereinbefore named, viz., the Mary Lee, Greyhound, and C. C. Keyser, became, through J. W. Black, part of this association. That Black received the *pro rata* share coming to the Keyser as one of the boats of the association from the time she entered into it until on or about the date of her sale by the sheriff.

Libelant contends that, as far as the evidence establishes the separate earnings during the whole of the period of the tug Keyser, that they must be accounted for to him under the decree of the court, as Black was, during the period she was in his possession, under the release bond given in the 3rd district court, a possessor in bad faith, and that, having placed the Keyser in the Towboat Association on the 1 December and continued to draw her earnings as if she

were an active boat of the association from the time she laid up up to her surrender to the sheriff, and until her sale by the sheriff, that Black must also account to Keyser during this period. That Keyser was not divested of ownership until the sale by the sheriff.

37 Libelant further contends that in making a statement of the liens which were resting against the Keyser at the time of her seizure only the admiralty liens must be stated, and that no disbursement — charged against the Keyser unless it was disbursed to render necessary her earnings.

The respondent contends that the accounts as rendered by Black to Neafie and Levy of the earnings of the Keyser up to December 29, '77, when she was laid up—that from the 10th January, 1878, & until her sale by the sheriff—not being in the possession of the Keyser, the libelant is not entitled to an account for the same from him.

In stating the account herein I agree with libelant, viz., that if the evidence furnishes a statement of the separate earnings of the Keyser she must be credited with them and charged with her own disbursements, and that as long as Keyser was not legally divested of the ownership of the tug Black must account to him for all moneys received for her benefit.

38 But as to the classification of the liens I think there should not be any distinction made as to admiralty or State liens.

The claims that were paid were *bona fide* debts against the vessel and so acknowledged by Keyser, and could have been enforced as against the tug or Keyser, and these debts, having been extinguished, inured as much to the benefit of the tug as respondent's or other interested parties.

I have allowed them in stating the account.

Exhibits, showing accounts of Black, as manager, with Neafie & Levy, have been adduced in evidence. The items objected to therein will be passed upon at the proper time.

The log-book shows the separate earnings of the Keyser from the time Black took possession of her until the formation of the Towboat Association. The rates at which the following calculations are made are derived from Exhibit 51, annexed to commission containing evidence of Neafie and Levy, in which is mentioned the *the* tonnage, rate of towage, name of vessel, and amount admitted to have been earned up to Dec'r, 1877; also from a letter to Black, annexed to same commission, dated Dec'r 8, '77, fixing the rate of tow-

39 age from the city to the sea at 15 cents per ton; and also from the evidence of Black, taken before Collins, not. pub., Feb'y 1, '82.

The tonnage of the vessels towed are stated in Exhibit- A. B, C, and are admitted to be.

I have referred to Exhibit 51 and the evidence of Black previous to stating my account of the separate earnings of the Keyser, as derived from the log book, because I have given the Keyser credit only for the services performed, and at the rates of towage as fixed by Black in his evidence. This rate is a deduction of 10 cents in the full charge for towing to city from sea and back to sea, and *vice versa*,

wherein the full towage was not performed by the Keyser, and have charged the rates as fixed by Black for other minor towages, such as from sea to Southwest Pass, to and from quarantine from head of passes, &c.

As previously stated the log book will show the separate earnings of the Keyser, and they are enumerated herein below at the rates fixed by Black, is his evidence aforestated, viz: The following
40 vessels, as taken from the log book, were towed from sea to city. The towage and rates, less 15 cents per ton, are taken from Exhibit 51:

| Date. | Name of vessel. | Rate. | Tonnage. | Am't of towage. |
|---|---|---|---|---|
| Oct. 30, '77. | Ship Arcturus | 50c. | 1,054 | 527 |
| 30, '77. | Wyoming | 35 " | 912 | 319 |
| Nov. 4, '77. | Bark Alpa | 35 " | 540 | 189 |
| 4, '77. | " Bengal | 35 " | 998 | 349 |
| 9, '77. | Ship A. Sutherland | 60 " | 1,134 | 680 |
| 15, '77. | " Saranac | 25 " | 885 | 213 75 |
| 15. | Sch. R. B. Locke | Round sum | | 100 |
| 19. | " Lily of Valley | $\frac{4}{5}$ of 100 | | 72 73 |
| 19. | Bark Christina | 45 | 420 | 189 |
| 19. | " Regina | 45 | 855 | 384 75 |
| 23. | " C. Gladiola | 30 | 513 | 153 92 |
| 23. | " Lugger | Round sum | | 34 50 |
| | Earnings from sea to city towages | | | 3,213 53 |

During the same period the following vessels were towed by the Keyser from the city to the sea, rate of towage 15 cts., as per evidence of Black:

| Date. | Name of vessel. | Rate. | Tonnage. | Am't towage. |
|---|---|---|---|---|
| Nov. 21, '77. | Ship Jno. Patton | 15c. | 1,158 | 173 70 |
| 27, '77. | Bark E. Edwards | Round sum | | 50 |
| | Earnings from city to sea towages | | | 223 70 |

The two above items, except the towage of the Patton, are from the log of the respective dates, and are not in Exhibit No. 51.
41 The following were towed from quarantine to city at 20 cts. per ton, as per evidence of Black.

| Date. | Name of vessel. | Rate. | Tonnage. | Am't towage. |
|---|---|---|---|---|
| Nov. 9, '77. | Bark Aretusa | 20 | 509 | 101 80 |
| 16, " | " Atlantic | " | 284 | 56 80 |
| 7, | " Eliza | " | 352 | 70 40 |
| | | | | 229 00 |

The charges for the bark Aretusa are the same as allowed Eliza and Atlantic in the exhibit.

The following were towed from the sea to Southwest Pass at the rate of five cts. per ton, as per evidence of Black:

| Date. | Name of vessel. | Rate. | Tonnage. | Am't towage. |
|---|---|---|---|---|
| Nov. 3, '77. | Ship Milberry | 5c. | 1,079 | 53 95 |
| 18, " | Lorely | 5c. | 496 | 24 80 |
| | Earnings from sea to S. W. Pass | | | 78 75 |

The following vessels were towed from sea to head of passes, and then with help of Greyhound to quarantine:

Allowance to the Keyser as per evidence of Black on rate of towage 15c. per ton:

| Date. | Name of vessel. | Rate. | Tonnage. | Am't towage. |
|---|---|---|---|---|
| Nov. 8, '77. | Ship Riverside | 15c. | 1,234 | 185 10 |
| 8, " | Sch'r J. H. Atwood | " | 663 | 99 45 |
| | | | | $284 55 |

The tonnage of the two abve-named vessels are derived from exhibit No. 51. I shall now give a recapitulation of the
42 earnings of the Keyser, as above shown, from 27 October to 1st December, 1877. As before stated, the Keyser, after last-named date, was put in the Towboat Association, and there is no evidence adduced to show her earnings, so that they must be computed as per account rendered, as shown in Exhibit No. 53.

*Recapitulation.*

Earnings of the Keyser from October to 1 December, '77:

| | |
|---|---|
| Towage from sea to city | $3,213 53 |
| " " city to sea | 223 70 |
| " " quarantine to city | 229 |
| " " sea to S. W. Pass | 78 75 |
| " " head of passes | 284 55 |
| | $4,029 53 |

| | |
|---|---|
| Earnings of and monies received for ac. of the tug Keyser for Dec'r, 1877, according to Black's ac. of credit, | |
| $\frac{1}{3}$ of $1,977.75, being for coal sold | 659 25 |
| Credit $\frac{1}{3}$ of $6,605,58, proportiou of towages | 2,201 86 |
| Same as above for Jan'y, 1878: | |
| Credit of $\frac{1}{3}$ of $8,370.78, proportion of towages | 2,790 26 |
| " $\frac{1}{3}$ " $900 for coal sold | 300 00 |
| Same as above for Feb'y & M'ch, '78: | |
| Proportion of towages as per Exhibit 55 | 3,875 05 |
| Total | 9,826 42 |

Proportion of earnings to May 15, '78, as per Exhibit No. 56,

1,919.34; adding 4,029.23, 9,826.42, and 1,919.34 would make
43 a grand total of $15,775.29 of the earnings and monies received for ac. of the tug C. C. Keyser by J. W. Black. An inspection of the books of J. W. Black show a difference in two items stated in the credit side of the account current rendered Neafie and Levy, viz.: ⅓ of $8,370.78, proportion of towages, stated, in the account current as $2,790.26, should be $3,063.42, proportion of earnings, &c., in May, 1878, $1,919.34 should be $2,467, and there should be added the sum of $1,429.65, being proportion of coal to credit of tug Keyser, as per letter of Black, dated April 27, 1878.

*Disbursements.*

As regards the separate disbursements for the period above stated, no evidence has been adduced to show or prove the same. I am, therefore, compelled to have recourse to such evidence as has been submitted, and which is found in the account offered in evidence.

These are subject to such objections as may or have been urged, and they are as follows:

Libelant objects to the charge for down towage in Exhibit 52 as not applicable to the Keyser.

The account as herein stated is only for actual towage performed.

44 These objections are sustained, and the Exhibit No. 52 reduced therefore to the sum of $192.70.

Libelant objects to the following items in the debit side of Exhibit No. 53, viz:

| | | |
|---|---|---|
| Am't paid Home Ins. Co. | 120 | |
| " proportion of Sandford & Cyclops | 495 | 65 |
| " damages to ship Arcturus | 75 | |
| Commissions on $8,556.59 at 5 % | 427 | 82 |

As regards the first item, it was for insurance effected on the vessel or tug by Black. It was a measure taken by Black to be reimbursed in case of loss of the tug by the perils of navigation, and having at the time no legal or equitable right to effect the same for the then owner, J. C. Keyser, it is rejected.

The next item is $495.65, proportion of the Sanford and Cyclops. This item seems to have been incurred as follows: At the time or shortly after the formation of the Towboat Association the tugs Sanford and Cyclops formed an opposition towboat line, and a bonus was offered them to withdraw their opposition, which was done, and the $495.65 represented the contributory portion of the Keyser.

45 The withdrawal of this opposition enured to the benefit of the Towboat Association and the different boats forming it, and as the libelant is entitled and claims the *pro rata* earnings of the association by this withdrawal, and was benefited thereby, the item should be, and is, allowed.

The next item is $75.00, damages to ship Arcturus. No evidence

is adduced to show that the tug Keyser was liable or contributory to such damages. It is therefore disallowed.

The next item is commission at 5% on $8,556.59, — to $427.82. Black, not having been considered the legal representative of libelant, cannot charge him with this item, and therefore is not entitled to same. It is disallowed.

Libelant further objects to the following items on the debit side of Exhibit 55, viz:

| | | |
|---|---|---|
| Down towage, ⅓ of $618.30 | $206 | |
| Comm. @ 5% on $3.875 | 193 | 75 |

On the same grounds as urged above—viz., that the Keyser only charges herein for her actual earnings—she did not make these down towages and does not charge for them. A reference to the log-book shows that she towed the vessels named from sea to city, and only charged for that portion of the services; therefore the down towages cannot be charged against him, and the items of percentage on commissions on the ground above stated for these items, for reasons above stated, are rejected.

46

Libelant further objects to the item $95.96 on debit side of Exhibit No. 56 on the ground above stated, viz., that libelant is not liable or charg-able with commissions to Black. This item is also rejected.

To the credit side of the account of the tug Keyser must be added the further sum of $1,429.65, being the proportion of coal on hand to credit of the Keyser, as per letter of Black annexed to commission, dated April 27, '78.

In preparing the necessary statement it will be seen that I have allowed all credits and debits as shown by the account currents, excepting such items as have been objected to and the objection sustained. On the credit side of the account from Oct. 28, '77, to Dec'r, '77, I have stated the credits from the log and not from the account, as the log showed the actual earnings of the tug for that period, and no proof having been adduced as to her actual earnings for the other period, the accounts and books have been adopted as the only evidence offered:

47

*Statement.*

| | | |
|---|---|---|
| Earnings of the Keyser from Oct. 25, '77, to 1 Dec'r, '77 | $4,029 | 53 |
| For the month of Dec'r, '77: | | |
| Credit of ⅓ of $1,977.75, being for coal sold | 659 | 35 |
| " ⅓ of 6,605.15, proportion of towages during Dec'r, '77 | 2,201 | 86 |
| Earnings of and monies received for ac. of the Keyser for Jan'y, '78: | | |
| ⅓ of $8,370.78, proportion of towages | 3,063 | 42 |
| ⅓ of $900 for coal sold | 300 | 00 |
| Earnings of and monies received for ac, of the Keyser for Feb'y & M'ch, 1878: | | |
| Proportion of towages, as per Exhibit 55 | 3,875 | 05 |

| | |
|---|---|
| Proportion of earnings & monies rec'd May, '78, as per Exhibit 56 | 2,467 00 |
| | 1,429 65 |
| Am't total | $18,025 76 |

The above represents the total amount to the credit of tug Keyser for proportion of towages earned by it or secured for its account by J. W. Black.

The disbursements allowed are as follows:

| | |
|---|---|
| Exhibit No. 52 | 192 70 |
| Disbursements, as per Exhibit 53 | 6,511 03 |
| " " " 55 | 2,642 69 |
| " " " 56 | 1,490 56 |

48 Allowed for the payment of the following debts against the tug C. C. Keyser, viz:

| | |
|---|---|
| B. D. Wood & Bro. | 2,281 40 |
| Woodward & Wight | 944 75 |
| Geo. W. Adams & *al.*, wages | 971 02 |
| Brown & Jones, for coal | 291 00 |
| Docking bill | 126 00 |
| | $15,451 15 |

Before striking a final balance I find that the disbursements allowed in Exhibit No. 52 should be $64.23½ instead of $192.70. As the account was rendered for account of tugs Mary Lee and Greyhound and Keyser, and not for the Keyser alone, this reduction would make the total amount of disbursements $15,322.68.

Recapitulation:

| | |
|---|---|
| Total earnings and moneys received for account of the tug Keyser from 28th October, 1877, to 10th May, 1878 | $18,025 76 |
| Disbursements for same period | 15,322 68 |
| Balance due Keyser | $2,703 08 |

Respectfully submitted.
March 17, '82. J. DEVONSHIRE, *Comm'r.*

49 *Libelant's Exception to Report of Commissioner. Filed March 18th*, 1882.

The exceptions of Albert Baldwin and J. Gundersheimer, subrogees of J. C. Keyser, libelant, to the report of the commissioner filed herein allege as follows:

1st. That said commissioner has erred in holding that no distinction should be made as to admiralty and State liens, and allowing as proper credits to the respondent the following sums, the payment

of which, if proved, did not enure to the benefit of the mortgage held by Neafie and Levy upon the steamtug C. C. Keyser, viz:

| | | |
|---|---|---|
| The sum paid | Woodward & Wight | $944 75 |
| " | Brown & Jones for coal | 291 |
| " | for docking bill | 126 |

The same being supplies and in the nature of repairs furnished and made in the home port.

The sum paid to Geo. W. Adams, master, 329.30, the same master's wages not being an admiralty claim or a lien on said vessel.

2nd. That, as shown by said report, there being no or sufficient evidence in the record to prove the items of disbursements charged by the respondent, none of said items should be allowed.

50 3. That especially should *be* the item styled "amount proportion of Sanford and Cyclops, $495.65," be rejected as a credit to respondent, the same being a sum paid as a bribe to induce the agent of the owners of the steamtugs Sandford and Cyclops, which vessels were under a charter to the libelant, to break said charter, which they did in consequence do, to the great loss and injury of the libelant.

Wherefore they pray that these exceptions be maintained, that the said report be amended by rejecting the items of alleged disbursements herein mentioned, and as amended be approved and decree rendered accordingly, with legal interest from the 7th day of May, 1878, until paid, and as in duty bound, &c.

CH'S S. RICE, *Proctor.*

*Submission of Report. March 24th*, 1882.

J. C. KEYSER
*vs.* } 11242.
J. W. BLACK.

The commissioner's report herein was called up.

C. S. Rice, for libelant.

H. C. Miller, for respondent, not present.

51 When the same was submitted by libelant on brief to be furnished within 10 days, and with leave to respondent until the 27th instant to file exception to the report, if he sees fit.

*Respondent's Exception to Report. Filed* 24 *March*, 1882.

J. C. KEYSER
*vs.* } 11242.
J. W. BLACK.

Defendant's exception to master's report.

The defendant excepts to the item of $4,029.13, allowed in the master's report for the earnings of the Keyser to December 1, 1877. From the time she was released from seizure under the release bond claim to December 1st, 1877, she was engaged in the towing business in conjunction with the Mary Lee and Greyhound. The work was

distributed between the three boats while the Keyser was employed in the river; the two other towboats were employed in bringing the vessels into the passes and in other services equally contributing to the common benefit. Unless the other two boats had been
52 outside securing the ships to be towed the Keyser would not have had them to tow.

It is manifestly, then, an error to credit the Keyser with all the towages of the vessels exhibited in her log, as the other towboats, by being employed outside the passes, in effect secured the towages which she made up the river.

The other boats, the Mary Lee and Greyhound, doubtless performed quite as much service in getting the vessels to be towed as the Keyser performed in towing them.

What justly belongs to the three boats conjunctently the report awards to one only. The earnings were necessarily to be distributed and were distributed. The proportionate share of the Keyser was allowed her. Neafie and Levy had an obvious interest in exacting all that she was entitled to demand. The account was rendered and settled between Black and Neafie and Levy, and sustained by the testimony in the record. To that proportionate share for earnings to December 1, 1877, the Keyser is to be restricted. The fair
53 credit for her proportion of those earnings is $2,605.22, instead of $4,029.53, allowed by the master.

See Exhibits 51 and 53 attached to Philadelphia commission.

Defendant also excepts to the items of towages from city to sea, from quarantine to city, from sea to Southwest Pass, from sea to head of passes allowed the Keyser in the master's report, the items being $223.70, $229, $78.75, and $234.55. The same erroneous basis is adopted with respect to these items; that is, the master's report is based on the idea that the Keyser is entitled to be credited with all the work she did without regard to the fact that she was working in conjunction with other towboats, and the services of each were contributory to a common pool

Defendant further shows that all the credits due the Keyser up to January 31 are shown by Exhibit 53. They were, Dec. 31, '77, $659.25, for coal; Dec. 31, '77, proportion of towages, $2,201.86; Jan'y 31, $2,790.26; Jan'y 31, coal, $300; towages for Nov., $2,605.22.

Defendant insists that neither under the decree nor under
54 the law can the defendant be made liable for any amounts whatever except her earnings to January 31; indeed, not up to that date, for the Keyser was returned to the sheriff on 10 January, 1878, and from that date remained under seizure. The decree makes the defendant liable for her earnings while he had possession of the Keyser. This possession ceased on the 10 January. If amounts were subsequently allowed the Keyser constructively, as if she was in the association line, when, in fact, she was in the hands of the sheriff, that was the good fortune of Neafie and Levy, but gives the libelant no claim.

Defendant therefore excepts to these items in the account of the master for credits derived subsequent to January 31, 1878, to acc't 3,875.05; for towages in Feb'y and March, $1,888; Exhibit 55,

$1,919.34, for towages, May 15, '78; and defendant also excepts to all other items for credits derived subsequent to January 31, 1878.

Defendant shows that even if all these credits, even after the Keyser's return to the sheriff, were allowed, then the net credit to the Keyser would only be $2,588; that is, deducting all the debits
55 properly chargeable to her, as shown by the account and testimony, and the defendant submits that no greater credit can be allowed her than said $2,588, even if, contrary to his objections and exception, and subsequent to January,— could be allowed.

Defendant shows that the account of earnings of the Anchor line, the Keyser, Greyhound, and Mary Lee, shows the estimated work at full rates for towages up and down, and hence the Keyser was properly debited with amounts accrued from down towages; therefore defendant excepts to the disallowanes by the master of the debits for down towages, to wit, $192, $70, $206, and to all other disallowances of charges for down towages.

Defendant excepts to the disallowances of his commissions, and insists that commissions were properly chargeable, such commissions being $427.22, $193.75, and to all other disallowances for commissions.

Defendant excepts to the disallowance of the charge for insurance, $127; for damages to Arcturus, $75; proportion charges for Sanford & Cyclops, $459.65, and defendant insists that said charges
56 are proper and sus[tained] by the evidence.

Defendant insists that the $\frac{1}{3}$ of $8,370.76 is $2,790, and is properly carried at that amount into the account, and defendant excepts to the increase of that $\frac{1}{3}$ to $3,063.42.

Defendant excepts to the credit allowed by the master of $1,429.65 for coal; the credit was stated in error and corrected in defendant's letter of May 31, '78, in the record.

Def't makes all their exceptions subject to the qualification that there is authority under the decree to allow any credits except for earnings while the Keyser was in possession of the defendant, say from Oct. 20, '77, to Jan'y 10, '78, and with that principal exception makes the other exceptions herein stated, in event that said principal exceptions is not sustained.

Defendant prays that these exceptions be sustained, and as the amount of privileged debts paid by Neafie and Levy, manifestly largely exceed any amount that can be allowed the libelant under the decree, and that a decree be rendered in favor of defendant.

57 MILLER, FINNEY AND MILLER,
*Defendant's Proctors.*

*Order Reinstating Cause and Fixing Exceptions to Report for Argument. April 29, 1882.*

Order. Report and Exceptions Submitted. May 12, 1882.

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This cause came on to be heard on the commissioner's report and

exceptions thereto, and having been argued by proctors for both sides, the court took time to consider.

*Judgment. Libel Dismissed. May* 19th, 1882.

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*vs.*
J. W. BLACK. } 11242.

This cause came on to be heard on the commissioner'- report and statement of account between the parties, the exceptions thereto, and was argued by counsel.

And thereupon, upon consideration thereof, the court doth
58 order, adjudge, and decree as follows, to wit:

That libelant's exceptions be overruled.

That respondent's exceptions be sustained so far as to allow respondent credit for the following items, viz:

| | | |
|---|---|---|
| 1. Down towage, $192.70 & 206.10 | | $398 80 |
| 2. Commissions, $427.82, 193.75 | | 621 57 |
| 3. Insurance, 120; damage to Arcturus, $25; and proportion charges for Sanford and Cyclops | | 459 65 |
| 4. By reducing item $3,563.42 to $2,790.26, making a difference of | | 273 16 |
| | | $1,898 18 |
| 5. And, lastly, by rejecting the credit of $1,429.65 for coal allowed the libelant through error, and embraced in item $18,025.76, earnings and monies received; said item is therefore reduced to | | $16,596 11 |

And thus amended the commissioner's report is confirmed and made the judgment of the court.

The final result of the investigation shows a balance in favor of respondent for $624.75, but inasmuch as he has made no claim for money in his pleadings the court can grant him no judg-
59 ment for any specific amount, and, therefore, adjudges and decrees that the libel be dismissed at libelant's costs.

*Rule for Rehearing. May 20th,* 1882.

J. C. KEYSER *vs.* J. W. BLACK.

On motion of Ch's S. Rice, proctor for libelant, it is ordered by the court that respondent show cause, on Friday, May 26th, 1882, why a rehearing should not be allowed herein on the exceptions to the commissioner's report, on the following grounds, to wit:

1. The court erred in disallowing the exceptions of the libelant to said report.

2. The court erred in allowing the following exceptions of the respondent to said report, viz:

*a.* The items of $206.10, $192.70, as down towages, the said sums not having been credited in any manner or form, as earnings or otherwise, of the steamtug C. C. Keyser.

*b.* In allowing the sum of $459.65, proportion paid Sanford and Cyclops the second time, it having been already allowed to the respondent in the report of the commissioner.

60 *c.* In finding the sum due ½ towage for January, 1878, to be $2,790, and not $3,063.42, as reported by the commissioner, the difference between said sums being earnings showing by the business books of the respondent, but not placed in the accounts rendered by him to Neafie and Levy and now on file in this suit.

*d.* In allowing the items of $120 for insurance, $75 for damages; to Arcturus, $427.52, and $193.75 commissions.

Rule for rehearing argued and submitted May 26th, 1882.

*Order Granting Rehearing and Judgment for Libelant. May* 27, 1882.

J. C. KEYSER
*vs.* } 11242.
J. W. BLACK.

The libelant's application for a rehearing came on to be heard and was argued by counsel.

On consideration thereof, it is ordered that the judgment of the 19th inst. be set aside and that a rehearing be granted.

61 And upon a reconsideration of the cause, the court now adjudges and decrees that the sum of $2,703.08, found by the commissioner as due to the libelant, be diminished by allowing to the defendant credit of the following items, viz:

| | |
|---|---|
| 1. Coal bill erroneously debited to defendant | $1,429 65 |
| 2. Commissions $427.82 & 193.75 | 621 57 |
| 3. Insurance | 120 00 |
| 4. Damages to ship Arcturus | 25 00 |
| Leaving a balance of due by defendant | 506 86 |
| | $2,703 08 |

It is accordingly ordered, adjudged, and decreed that A. Baldwin and J. Levy and Co., subrogated to the rights of the libelant on undivided halves, do recover from the respondent, Jno. W. Black, the sum of five hundred and six $\frac{86}{100}$ dollars and costs of suit.

Judgment entered May 27th, 1882.
" signed June 2nd, 1882.

EDWARD C. BILLINGS, *Judge.*

*Appeal by Defendant. June 7th* 1882.

J. C. KEYSER
*vs.* } 11242.
J. W. BLACK.

62 On motion of Miller, Finney, and Miller, proctors for defendant, and on suggesting that the defendant is aggrieved by the final decree herein rendered on the 27th May, 1882, and signed

on the 2nd June, 1882, against him in favor of A. Baldwin and J. Levy & Co. for $506.86 and costs, and upon further showing that defendant desires to appeal from said decree:

It is now ordered that the defendant, John W. Black, do have a suspensive appeal from said decree upon furnishing his bond to operate as a supersedeas in the sum of $1,500, conditioned as the law directs, said appeal to be returnable to the circuit court of the U. S. for the 5th circuit and eastern district of Louisiana on the 1st Monday of November, 1882, as the law directs.

*Appeal by Libelants, Subrogees. June 16th,* 1882.

J. C. KEYSER
*vs.*
J. W. BLACK. } 11242.

On motion of Ch's S. Rice, proctor for Albert Baldwin and
63 J. Levy & Co., subrogees of libelant, and on suggesting that they are aggrieved by the final decree herein and desire to appeal therefrom to the circuit court:

It is ordered by the court that they be granted an appeal from said decree upon executing and filing bond in the sum of $200, with good and solvent surety thereon, conditioned as the law requires, and that said appeal be made returnable to the circuit court of the United States for the eastern district of Louisiana on the 1st Monday of November, 1882.

*Appeal Bond. Filed June 7th,* 1882.

UNITED STATES OF AMERICA, *Eastern District of Louisiana:*

District Court of the United States. In Admiralty.

J. C. KEYSER
*vs.*
JOHN W. BLACK. } No. 11242.

Know all men by these presents that we, John W. Black, as principal, and Archy Maguire, as surety, are held and firmly bound unto A. Baldwin & J. Levy & Co., transferees of libelant's
64 rights, in the sum of fifteen hundred dollars, to be paid to the said A. Baldwin and J. Levy & Co., for the payment of which, well and truly to be made in lawful money of the United States, we bind ourselves and each of us, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seal, and dated at New Orleans the 7th day of June, 1882.

Whereas the above-named John W. Black has appealed to the circuit court of the United States for the 5th circuit and eastern district of Louisiana from a final judgment of the district court of the United States for said district, rendered against him on the 27th day of May, 1882, and signed on the 2nd day of June, 1882, in the above-entitled cause:

Now, therefore, the condition of this obligation is such that if the above-named appellant shall prosecute his appeal to effect, and answer all damages and costs and satisfy whatever judgment may be rendered against him if he fail to make his appeal good, then this obligation to be void; otherwise, the same shall be and
65 remain in full force and effect.

JOHN W. BLACK. [L. S.]

his
ARCHY X MAGUIRE. [L. S.]
mark.

Signed, sealed, and delivered in the presence of—
K. LOEW.

Bond approved.

EDWARD C. BILLINGS, *Judge.*

Archy Maguire, surety on the within appeal bond, being duly sworn, says: That he resides in this city, and is worth the sum of $1,500 over and above his just debts and liabilities.

his
ARCHY × MAGUIRE,
mark.
8th Celeste, 1st Dist.

Sworn to and subscribed before me, this 7th day of June, 1882.
K. LOEW,
*U. S. Com'r.*

*Appeal Bond. Filed August* 24, 1882.

UNITED STATES OF AMERICA, *Eastern District of Louisiana:*

District Court of the United States. In Admiralty. Appeal Bond.

JOS. C. KEYSER
*vs.*
JOHN W. BLACK. } No. 11242.

Know all men by these presents that we, Albert Baldwin
66 & J. Levy & Co., subrogees of Jos. C. Keyser, as principal, and John Phelps, as surety, are held and firmly bound unto John W. Black in the sum of two hundred dollars, to be paid to the said John W. Black, for the payment of which, well and truly to be made in lawful money of the United States, we bind ourselves and each of us, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated at New Orleans the 24th day of August, 1882.

Whereas the above-named Albert Baldwin & J. Levy & Co., subrogated, have appealed to the next term of the circuit court of the United States for the 5th circuit and eastern district of Louisiana from a final judgment of the district court of the United States for said district rendered against them on 27 day of May, 1882, and signed on the 2nd day of June, 1882, in the above-entitled cause:

Now, therefore, the condition of this obligation is such that if the above-named appellant- shall prosecute their appeal to effect and answer all damages and costs and satisfy whatever judgment
67 may be rendered against them if they fail to make their appeal good, then this obligation to be good; otherwise, the same shall be and remain in full force and effect.

J. LEVY & CO., [L. S.]
Per CH'S S. RICE.
ALBERT BALDWIN. [L. S.]
JOHN PHELPS. [L. S.]

*Proceedings in Circuit Court. Cause fixed for Trial.*

Extract from the Minutes. November Term, A. D. 1882.

NEW ORLEANS, MONDAY, *February 26th*, 1883.

Court met pursuant to adjournment.

Present: Hon. Don A. Pardee, circuit judge.

JOS. C. KEYSER
*vs.* } 10055.
JOHN W. BLACK.

On motion of Ch's S. Rice, proctor for libelant, it is ordered that this cause be set down for trial on Saturday, the 3rd of March, 1883, at 11 a. m., and that notice be given to respondent or his proctor.

*Order. Cause Continued.*

Extract from the Minutes of Saturday, March 31st, 1883.

J. C. KEYSER
*vs.* } 10055.
JOHN W. BLACK.

68 It is agreed by the counsel for the parties respectively that this cause be continued till Tuesday next, the 3rd April, 1883, at 11 o'clock a, m.

*Submission.*

Extract from the Minutes of April 3rd, 1883.

Present: Hon. Don A. Pardee, circuit judge.

J. C. KEYSER
*vs.* } 10055.
J. W. BLACK.

This cause came on to be heard on the transcript of the record from the district court of the United States in and for this district, and on the testimony filed by agreement of counsel, and was argued by the counsel for the parties respectively, and submitted. And the court took time to consider.

*Findings and Decree. Entered and Filed April 14th, 1883.*

UNITED STATES OF AMERICA:

Fifth Judicial Circuit, Eastern District of Louisiana.

69 JOSEPH C. KEYSER *vs.* JOHN W. BLACK.

Admiralty appeal.

This cause came on to be heard on the record and evidence, and was argued, whereupon the court finds the following as the facts of the case:

1st. That in October, 1877, Neafie and Levy, of Philadelphia, were creditors of J. C. Keyser, the libelant herein, for eighteen thousand one hundred and sixty-four dollars, with interest from ——, 18—, for which amount they had a mortgage upon the steamtug C. C. Keyser, the debt being for the price of the tug built by them for Keyser.

2nd. That on 11th October, 1877, they begun suit in the third district court for the parish of Orleans to collect said debt; in accordance with the law sequestered the tug C. C. Keyser; in due course recovered judgment against J. C. Keyser, the libelant, for the full amount of their debt with interest; issued execution against him; sold the tug under the execution, the judgment recognizing their shortage; the tug was sold for sixteen thousand and seventy-

70 five dollars; was purchased by said Neafie and Levy, the amount credited up on their debt, and there remained due to them by J. C. Keyser on the judgment, after giving him credit for all that was made on the execution, the sum of three thousand three hundred and eighty-seven dollars, with interest, which is still due.

3rd. That pending said suit of Neafie and Levy against J. C. Keyser, the tug not having been bonded by him, after the lapse of the ten days allowed by law to bond, the said Neafie and Levy bonded the tug, and accordingly the said tug was discharged under the orders of the court into their possession under said release bond by them furnished, under and in accordance with the 279th and 280th articles of the Code of Practice, and that John W. Black, the defendant herein, was the surety of Neafie and Levy upon the release bond, and was their agent here to receive and hold possession of said tug-boat, and under the order of release did receive and hold possession for them accordingly.

4th. That the tug was held under the release bond by Neafie and Levy, through the defendant as their agent, from 25th October,

71 1877, to the 10th January, 1878, on which date the tug was returned to the custody of the sheriff, held by him under the writ of sequestration, on the suit of Neafie and Levy *vs.* J. C. Keyser, until the 6th May, 1878, when the tug was sold under execution, issued in said suit, to satisfy the judgment therein, Neafie and Levy becoming the purchasers, as already stated.

5th. That during part of the period the tug was held by defendant, as agent of Neafie and Levy, under the release bond—that is,

from 25th October, 1877, to 29th December, 1877—the tug was in actual use, being employed in the business of towing vessels—first, in conjunction with two other tow-boats owned by the defendant, to wit, the Mary Lee and Greyhound, the three forming the Anchor Line of tow-boats, and afterwards the tug was employed in towing, in conjunction with other two boats, forming the Associated Lines, but from the 29th December, 1877, no use was made of the tug whatever; she was returned to the possession of the sheriff [and] held by him under the writ of *sequestration* and execution until sold by him under the execution.

72 6th. That the use made by Black of the tug, as stated, was with the authority and under the directions of his principals, Neafie and Levy, to whom he accounted for all the earnings of the tug, and the defendant acted throughout, in becoming surety on the release bond, receiving, holding, and using the tug, as agent for Neafie and Levy.

7th. That for the period from the date of the release of the tug, October 25th, 1877, the tug being employed in the business of towing as one of the Anchor Line, the three boats working together, one bringing vessels in from the sea, the other two towing up and down the river; the earnings of the three boats were pooled, and of the joint earnings the tug C. C. Keyser was allowed and earned as her share of the gross earnings twenty-six hundred and five ($2,605) dollars; that from the 1st to 29th December, 1877, the tug was placed by defendant in the associated lines of tow-boats, composed of all the tow-boats, was used in conjunction with the tow-boats of the

73 line, and earned and was allowed the sum of twenty-two hundred and one $\frac{86}{100}$ dollars, gross earnings, as her share of the pooled receipts of all the tow-boats of said lines.

8th. That although the tug was not used at all after 29th December, 1877—was in the hands of the sheriff from 10th January, 1878, to date of the sale under the execution—yet, having been placed in the associated lines of tow-boats by defendant, as agent of Neafie and Levy, under the rules of which lines tow-boats placed therein were allowed their share of the earnings whether used or not, the defendant received from the association lines, as accruing to the tug under the rules, $2,790.26, $1,765.60, $2,109.26, $332.52, $2,201.86.

9th.. All these sums earned or allowed the tug were carried into the account between the defendant and Neafie and Levy. They, Neafie and Levy, were charged with the expenses, coal, wages, supplies, and other disbursements incident to the employment of the tug, and there resulted the following net credits to Neafie and Levy from all the sums earned by the tug C. C. Keyser or allowed to her from the associated lines when not used at all: $1,422.72, $832.50, and

74 $332.52, aggregating two thousand five hundred and eighty-eight $\frac{88}{100}$ dollars, which was paid to his principals, Neafie and Levy, by the defendant, as derived by him in the manner stated for and on account of the tug.

10th. While the tug-boat Keyser was in the possession of and employed by the defendant Black, as aforesaid, the actual work done by the boat, as shown by the log (and disregarding pool with An-

chor Line) for the month of November, amounted to four thousand and twenty-nine & $\frac{53}{100}$ dollars, and the earnings for the month of December, as shown by the pool account, amounted to two thousand two hundred and one & $\frac{86}{100}$ dollars, making a total of six thousand two hundred and thirty-one and $\frac{39}{100}$ dollars as the actual earnings of the said tug, all of which came into the hands of defendant Black as agent as aforesaid, and that during the actual use of said tug as aforesaid the expense of running amounted to the sum of four thousand four hundred and twenty-eight & $\frac{97}{100}$ [dollars], made up of the following items:

| | | |
|---|---|---|
| Undisputed expense | $2,577 | 83 |
| Insurance | $120 | 00 |
| 75 Coal consumed | $1,419 | 58 |
| Commission on $6,231.39 | $311 | 56 |

All of which were paid by defendant Black, as agent, as aforesaid.

11th. When the tug was seized by Neafie and Levy under their mortgage she was encumbered with the following lien and privileged debts:

| | | |
|---|---|---|
| B. D. Wood & Bro., for cash | $2,281 | 40 |
| Geo. W. Adams, master, and crew, for wages | $971 | 02 |
| To Woodward and Wight, for supplies | $944 | 75 |
| To Brown and Jones, for coal | 291 | 00 |
| Aggregating | $4,488 | 17 |

All of which privileged debts taking precedence of Neafie and Levy's 6 mortgages were paid by them under subrogations, legal as well as express, to the rights of these lien and privilege creditors. All these lien and privileged debts were created by the libelant Keyser, and were his debts discharged by Neafie and Levy. These payments by Neafie and Levy were all made from the date of the seizure of the tug under their sequestration to the day of the sheriff's sale to them.

And thereupon the court finds the following conclusions of law:

1st. The defendant Black was lawfully in possession of the
76 tug-boat Keyser as the agent of Neafie and Levy, who were lawfully in control of the same under the order of a court of competent jurisdiction.

2nd. There was no liability on the part of Black, *ex contractu* or *ex delicto*, to account to libelant for the use or earnings of said tug-boat.

3rd. The libel should be dismissed with costs.

Considering the aforesaid findings of fact and conclusions of law, it is ordered, adjudged, and decreed that the libel in this case be dismissed, and that the libelant pay the costs in this and in the district court.

(Signed) DON A. PARDEE,
*Circuit Judge.*

*Subrogation to Baldwin.*

Extract from the Minutes. April Term, A. D. 1883.

NEW ORLEANS, FRIDAY, *June 8th*, 1883.

Court met pursuant to adjournment.

Present: Hon. Don. A. Pardee, circuit judge.

JOS. C. KEYSER
*vs.*
JOHN W. BLACK. } 10055.

77 On motion of Chas. S. Rice, proctor, and on exhibiting to the court the written transfer and subrogation made by J. Levi & Co. to A. Baldwin of all their rights, title, and interest in and to the above-entitled and numbered suit:

It is ordered by the court that said Albert Baldwin be recognized as the transferee of said rights, title, and interest, and, as such, subrogated to all the rights, actions, and remedies of said J. Levi & Co. in the premises, and that notice thereof be given to the respondent.

*Motion and Order for Appeal.*

Extract from the minutes of Saturday, June 9th, 1883.

JOS. C. KEYSER
*vs.*
JOHN W. BLACK. } 10055.

On motion of Chas. S. Rice, proctor for Albert Baldwin, subrogated to all the rights and actions herein of Jos. C. Keyser, libelant, and of his cosubrogees, J. Levi & Co., and on suggesting to the court that there is error in the decree entered herein on the 14th day of April, 1883, dismissing the libel filed in said cause, and that he is aggrieved and desires an appeal from said decree to the Supreme Court
78 of the United States to operate as a supersedeas:

It is ordered by the court that he be allowed an appeal from said decree to operate as a supersedeas, returnable to the Supreme Court of the United States on the second Monday of October, 1883, upon mover filing bond in the sum of two hundred and fifty dollars, with good and sufficient surety thereon, and conditioned as the law requires.

*Bond for Appeal. Filed June 12th*, 1883.

UNITED STATES OF AMERICA:

Know all men by these presents that we, Albert Baldwin, as principal, and Cartwright Eustis, as surety, are held and firmly bound, jointly and severally, unto John W. Black, and all other persons in interest, in the sum of two hundred and fifty dollars, lawful money of the United States of America, to be paid to the said John W. Black, or other persons in interest, his or their heirs, executors, administra-

tors, and assigns; for which payment, well and truly to be made, we bind ourselves, and each of us by himself, and each of our heirs, executors, and administrators, firmly by these presents.
79 Sealed with our seals, and dated the 12th day of June, in the year of our Lord eighteen hundred and eighty-three.

Whereas the said Albert Baldwin having heretofore, to wit, on the 9th day of June, 1883, taken an appeal to the Supreme Court of the United States from and to reverse the decree rendered on the 14th day of April, 1883, by the circuit court of the United States for the fifth circuit, holding sessions in and for the eastern district of Louisiana, in the suit of Joseph C. Keyser *versus* John W. Black, No. 10055 of the docket thereof:

Now, the condition of the above obligation is that if the above-bounden Albert Baldwin shall prosecute his said appeal to effect, and shall answer all damages and costs if he shall fail to make good his plea, then this obligation shall be void; otherwise to remain in full force and virtue.

(Signed) ALBERT BALDWIN. [L. S.]
" CARTWRIGHT EUSTIS. [L. S.]

UNITED STATES OF AMERICA, }
*District of Louisiana*, } *ss*:

Personally appeared Cartwright Eustis, who, being duly sworn, deposes and says that he is the surety on the within bond;
80 that he resides in the city of New Orleans, Louisiana, and is worth the full sum of two hundred and fifty dollars over and above all of his debts and liabilities and property exempt from execution.

(Signed) CARTWRIGHT EUSTIS.

Subscribed and sworn before me, this 12th day of June, 1883.
[SEAL.] (Signed) T. WHARTON COLLINS,
*Notary Public, Parish of Orleans, State of Louisiana.*

81 UNITED STATES OF AMERICA:
Circuit Court of the United States, Fifth Circuit and [Eastern] District of Louisiana.

CLERK'S OFFICE.

I, Francis A. Woolfley, clerk of the circuit court of the United States for the fifth circuit and [eastern] district of Louisiana, do hereby certify that the foregoing 80 pages contain and form a full, complete, true, and perfect transcript of the record and proceedings had, together with all the evidence adduced on the trial of the case of Joseph C. Keyser, Albert Baldwin, subrogee, *vs.* John W. Black, No. 10055 of the docket of the said court.

Witness my hand and the seal of said court, at the city of New Orleans, this 13th day of July, A. D. 1883.

Two (2) words interlined.
Six (6) words erased.
NOTE.—Words in brackets are interlined.

[Seal of U. S. circuit court for the 5th circuit & eastern district of La.]

Approved. F. A. WOOLFLEY, *Clerk.*

I, Don A. Pardee, United States [circuit] judge for the [eastern] district of Louisiana, do certify that Francis A. Woolfley, whose name is signed to the above certificate as clerk of the circuit court of the United States for the fifth circuit and [eastern] district of Louisiana, was, at the time of signing said certificate, and is now, the clerk of said court; that said certifice is in due form of law, and that full faith and credit are due to his official attestations as such clerk.

Given under my hand, at the city of New Orleans, in said district this 13th day of July, A. D. 1883.

Three (3) words interlined.

Approved. DON A. PARDEE, *Judge.*

NOTE.—Words in brackets are interlined.

82 THE UNITED STATES OF AMERICA:

Circuit Court of the United States, Eastern District of Louisiana.

The President of the United States to John W. Black, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at the city of Washington on the second Monday of October next, pursuant to a motion and order for an appeal filed in the clerk's office of the circuit court of the United States for the fifth circuit and eastern district of Louisiana, wherein Albert Baldwin, subrogated, is appellant, and you are appellee, to show cause, if any there be, why the decree rendered against the said Albert Baldwin, subrogated, as in said motion and order for an appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 12th day of June, in the year of our Lord one thousand eight hundred and eighty-three.

DON A. PARDEE, *Judge.*

[Endorsed:] R. Miller & Finney, proctors. United States circuit court, eastern district of Louisiana. No. 10055. J. C. Keyser, Albert Baldwin, subrogated appellant, *vs.* John W. Black, appellee. Citation to appellee.

83 *Marshal's Return.*

Received Jun- 12, 1883, by the U. S. marshal, and on June 13th, 1883, I served a true copy of the within citation of appeal on John W. Black, appellee herein, by handing the same to Henry C. Miller, of Miller & Finney, in person, in the city of New Orleans, the proctors for the within-named appellee.

J. R. G. PITKIN,
*U. S. Marshal, Eastern Dist. of La.,*
By DAN. A. ROSE,
*D'y U. S. Marshal.*

Personally appeared before me Dan. A. Rose, a lawful deputy of

tors, and assigns; for which payment, well and truly to be made, we bind ourselves, and each of us by himself, and each of our heirs, executors, and administrators, firmly by these presents.
79 Sealed with our seals, and dated the 12th day of June, in the year of our Lord eighteen hundred and eighty-three.

Whereas the said Albert Baldwin having heretofore, to wit, on the 9th day of June, 1883, taken an appeal to the Supreme Court of the United States from and to reverse the decree rendered on the 14th day of April, 1883, by the circuit court of the United States for the fifth circuit, holding sessions in and for the eastern district of Louisiana, in the suit of Joseph C. Keyser *versus* John W. Black, No. 10055 of the docket thereof:

Now, the condition of the above obligation is that if the above-bounden Albert Baldwin shall prosecute his said appeal to effect, and shall answer all damages and costs if he shall fail to make good his plea, then this obligation shall be void; otherwise to remain in full force and virtue.

(Signed) ALBERT BALDWIN. [L. S.]
" CARTWRIGHT EUSTIS. [L. S.]

UNITED STATES OF AMERICA, }
*District of Louisiana,* } *ss:*

Personally appeared Cartwright Eustis, who, being duly sworn, deposes and says that he is the surety on the within bond;
80 that he resides in the city of New Orleans, Louisiana, and is worth the full sum of two hundred and fifty dollars over and above all of his debts and liabilities and property exempt from execution.

(Signed) CARTWRIGHT EUSTIS.

Subscribed and sworn before me, this 12th day of June, 1883.
[SEAL.] (Signed) T. WHARTON COLLINS,
*Notary Public, Parish of Orleans, State of Louisiana.*

81 UNITED STATES OF AMERICA:

Circuit Court of the United States, Fifth Circuit and [Eastern] District of Louisiana.

CLERK'S OFFICE.

I, Francis A. Woolfley, clerk of the circuit court of the United States for the fifth circuit and [eastern] district of Louisiana, do hereby certify that the foregoing 80 pages contain and form a full, complete, true, and perfect transcript of the record and proceedings had, together with all the evidence adduced on the trial of the case of
1 2 3 4 5 6
Joseph C. Keyser, Albert Baldwin, subrogee, *vs.* John W. Black, No. 10055 of the docket of the said court.

Witness my hand and the seal of said court, at the city of New Orleans, this 13th day of July, A. D. 1883.

Two (2) words interlined.
Six (6) words erased.
NOTE.—Words in brackets are interlined.

[Seal of U. S. circuit court for the 5th circuit & eastern district of La.]

Approved. F. A. WOOLFLEY, *Clerk.*

I, Don A. Pardee, United States [circuit] judge for the [eastern] district of Louisiana, do certify that Francis A. Woolfley, whose name is signed to the above certificate as clerk of the circuit court of the United States for the fifth circuit and [eastern] district of Louisiana, was, at the time of signing said certificate, and is now, the clerk of said court; that said certifice is in due form of law, and that full faith and credit are due to his official attestations as such clerk.

Given under my hand, at the city of New Orleans, in said district this 13th day of July, A. D. 1883.

Three (3) words interlined.

Approved. DON A. PARDEE, *Judge.*

NOTE.—Words in brackets are interlined.

82 THE UNITED STATES OF AMERICA:

Circuit Court of the United States, Eastern District of Louisiana.

The President of the United States to John W. Black, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at the city of Washington on the second Monday of October next, pursuant to a motion and order for an appeal filed in the clerk's office of the circuit court of the United States for the fifth circuit and eastern district of Louisiana, wherein Albert Baldwin, subrogated, is appellant, and you are appellee, to show cause, if any there be, why the decree rendered against the said Albert Baldwin, subrogated, as in said motion and order for an appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 12th day of June, in the year of our Lord one thousand eight hundred and eighty-three.

DON A. PARDEE, *Judge.*

[Endorsed:] R. Miller & Finney, proctors. United States circuit court, eastern district of Louisiana. No. 10055. J. C. Keyser, Albert Baldwin, subrogated appellant, *vs.* John W. Black, appellee. Citation to appellee.

83 *Marshal's Return.*

Received Jun- 12, 1883, by the U. S. marshal, and on June 13th, 1883, I served a true copy of the within citation of appeal on John W. Black, appellee herein, by handing the same to Henry C. Miller, of Miller & Finney, in person, in the city of New Orleans, the proctors for the within-named appellee.

J. R. G. PITKIN,
*U. S. Marshal, Eastern Dist. of La.,*
By DAN. A. ROSE,
*D'y U. S. Marshal.*

Personally appeared before me Dan. A. Rose, a lawful deputy of

J. R. G. Pitkin, U. S. marshal for the eastern district of Louisiana, and makes oath that he served a copy of the within citation of appeal on the appellee herein named, as set forth in his official return hereon.

DAN. A. ROSE,
*D'y U. S. Madshal.*

Subscribed and sworn before me, June 13, 1883.

F. A. WOOLFLEY,
*Commissioner United States Circuit Court,*
*Eastern District of Louisiana.*

Endorsed on cover: E. Louisiana C. C. U. S. No. 315. Albert Baldwin, subrogated for Joseph C. Keyser, appellant, *vs.* John W. Black. Filed 1st October, 1883.

# SUPREME COURT OF THE UNITED STATES.

NO. 71.

ALBERT BALDWIN, SUBROGATED TO JOSEPH C. KEYSER, APPELLANT,

*Versus*

JOHN W. BLACK.

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BRIEF FOR APPELLANT.

# SUPREME COURT OF THE UNITED STATES.

NO. 71.

ALBERT BALDWIN, SUBROGATED TO JOSEPH C. KEYSER, APPELLANT,

*Versus*

JOHN W. BLACK.

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## BRIEF FOR APPELLANT.

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I.

Joseph C. Keyser was the owner of the steam tug "C. C. Keyser" from the year 1874. She was built especially for the towing business, and was, up to the 11th of October, 1877, employed by Keyser, in towing vessels on the Mississippi River between the City of New Orleans, and the Gulf of Mexico, for hire.

Neafie & Levy, of Philadelphia, were the builders of the tug, and held a Mortgage upon her, for upwards of $18,000, to secure part of her cost of building.

October 11th, 1877, Neafie & Levy brought suit in the Third District Court for the Parish of Orleans, *via ordinaria*, to recover upon this debt and caused issuance of a *writ of sequestration*. Under this writ, the tug was seized by the sheriff of the parish and remained in his possession, until the 25th of that month.

By the law of Louisiana, (Code of Practice, Art. 279), it is provided, as follows:

"A defendant against whom a mandate of sequestration "has been obtained, except in cases of failnre, may have the "same set aside by executing his obligation in favor of the "sheriff, with one good and solvent surety, for whatever "amount the judge may determine, as being equal to the value "of the property to be left in his possession.

"And whenever the defendant shall fail or neglect to "execute such obligation in the manner prescribed, within "ten days after the seizure of the property by the sheriff,

"then it shall be lawful for the plaintiff, his agent or attorney "in fact, to give similar bond and security to the sheriff as "that required by law from the defendant, and to take the "property sequestered *into his possession*."

On the date mentioned, the defendant, Keyser, having failed to bond his vessel, Neafie & Levy availed themselves of their privilege and did so,— John W. Black acting as their agent or attorney in fact and signing the bond as surety.

At this time, John W. Black was the owner of two steam tugs, called the "Mary Lee" and the "Greyhound."
At once, upon the release of the "C. C. Keyser," he formed, with the *three* tugs, the "Anchor Line of Tow Boats," afterwards merged into the, "Associated Lines," and engaged the "Keyser" actively, up to the 29th day of December, in the business of towing vessels, on the Mississippi River, between New Orleans and the Gulf of Mexico.

During the month of November, 1877, the "Keyser" performed actual work amounting to four thousand and twenty nine 53–100 dollars (Transcript, pp. 29 and 30). As "her share" of the earnings of the *three* tugs, "she was allowed" by Black, twenty six hundred and five dollars,— showing that the gross work done, during this month by the "Mary Lee" and "Greyhound" together amounted to no more than thirty seven hundred and eighty five 47–100 dollars —(p. 29.)

For the month of December, up to the 29th day of which the "Keyser" was in actual use, in towing, she was awarded as her share of the earnings as one of the "Associated Lines," two thousand, two hundred and one 86–100 dollars.

On the 10th of January, 1878, the tug was ostensibly returned to the sheriff.

His Honor of the Circuit Court finds, "that, although the "tug was not used at all after 29th December, 1877,—was in the "hands of the sheriff from 10th January, 1878, to date of the "sale under the execution— yet having been placed in the "Associated Lines of towboats by defendant, as agent of "Neafie & Levy, under the rules of which lines, tow boats "placed therein were allowed their share of the earnings "whether used or not, the defendant received from the "Associated Lines, as accruing to the tug under the rules," an aggregate of $9198.90. (8th of the found facts, p. 29.)

These receipts accrued from January 1st to May 6th, 1878, on which last day the tug was sold by the sheriff, under execution, to satisfy the judgment rendered in the suit of Neafie & Levy versus Joseph C. Keyser, in the Third District Court. (4th of the found facts, p. 28).

His Honor of the Circuit Court has found as facts that, "during the *actual use* of said tug as aforesaid, the expense of "running amounted to the sum of four thousand, four hundred "and twenty eight 97–100 dollars." (10th of the found facts, p. 30).

Included in this sum are two items:

| | |
|---|---|
| Insurance - - - - - - - - - - | $120. |
| Commission on $6231.39 - - - - - - | 311.56 |

It is also found as a fact (9th, p. 29) that in the account of Black with Neafie & Levy, the latter *were charged* [by Black] with the expenses, coal, wages, supplies and other disbursements incident to the employment of the tug,—so that Neafie & Levy actually *were paid* by Black net two thousand, five hundred and eighty eight 88–100 dollars, as net earnings of the "Keyser" while in the Associated Lines, subsequent to January 1st, 1878.

The report of the Commissioner—appointed in the District Court—shows that among the items so charged to Neafie & Levy, by Black, were *Commissions*, $427.82, (p. 17), $193.75 and $95.96 (p. 18.); Insurance, $120. (p. 17); damages to ship Arcturus, $75. (p. 17.)

The purpose of the libel (pp. 1 and 2) was to compel Black, the defendant, to account for and pay to libellant, the earnings of the tug "C. C. Keyser," from the time of her seizure by the sheriff, under writ of sequestration, to that of her sale, under execution.

The liability of Black is based on the allegation that having taken possession of the tug, upon her being released on bond, he, "at once with said steam tug engaged in the "towing trade in the navigable waters of the Mississippi "River, in and about the harbor of New Orleans, and in said "River, for hire, *though he had no lawful right to do so.*"

In his answer and supplemental answer, Black sets up, as defences, matters of debt and account between the libellant and Neafie & Levy; matters which appellant submits have nothing to do with the claim set up by the libellant against the defendant.

He avers (p. 4) that the libellant was divested of the possession of the tug, by its seizure, on the 11th of October, 1877; "that subsequently, to wit: "on the 25th October, said "right of possession and *right of use* of said tug was vested "in Neafie & Levy and *in this defendant*; who held said "possession and exercised said use for them, by virtue of the "order of release of said Third District Court and release "bond herein before referred to."

He, also, avers, (p. 5.) that his "possession and use of "said tug was fully recognized and approved by said Neafie "& Levy, and *the earnings of said tug during said period are "the property of said Neafie & Levy*, accounts of which have "been rendered to and accepted by them, and have passed "into account between them and this defendant, and the "account of said earnings have been received by said Neafie "& Levy, and *said Keyser, has no claim to said earnings, or "any right of action for or in respect to the use* and possession "of said tug, while she was held under said release bond, or "for any period thereafter, or before."

And again (p. 6): "And this defendant denies that there "is any contract or obligation, whether implied or otherwise, "on the part of this defendant to said Keyser, or that he has "claims or shadow of claims in the premises, but the right by "which this respondent held and used said tug [is] as here-"inbefore stated; and he denies that he held and used said "tug for his own use and benefit, but for and on account of "Neafie & Levy, *as they, and he for them, had the right to do* "under said release bond."

II.

Appellant specifies, as errors in the conclusions of law, found by the Circuit Court:

1st: In that Neafie & Levy were lawfully *in control* of the steamtug Keyser under the order of a Court of competent jurisdiction.

2nd: In that there was no liability on the part of Black to account to libellant for the earnings of said tugboat.

3rd: In that the libel should be dismissed.

III.

Libellant bases his claim upon the ground that neither Neafie & Levy nor the defendant had lawful right to *use* his tug, after her release, or receive her earnings after her restor-

ation to the sheriff; that the release gave Neafie & Levy, themselves, or by their agent, *possession* of the tug, but nothing more.

The *use* being unauthorized in law, it is no defence for Black to say that he used the vessel in his capacity of agent, and accounted for the earnings to his principals.

It is to be specifically noted that libellant has not and does not question the right of *possession* existing in Neafie & Levy, and the defendant as their agent; but it is equally true that, under the law of Louisiana, the earnings or revenues of the tug while in the hands of the sheriff, under writ of sequestration, or in the hands of Neafie & Levy, or their agent, were the property of the owner.

There is a vast difference between *possession* and *use*, and it has been the effort of defendant to merge and confuse the right of *use*, which he had not, with that of *possession*, which he unquestionably had.

Article 2972 of the Civil Code of Louisiana declares that "sequestration is either conventional or ordered by the "judge."

Art. 2973—"Sequestration is a kind of *deposit*."

Art. 2979. "The judicial deposit [or sequestration] is "that which is made in consequence of an order or judgment "rendered by a judge in the cases provided for by the laws "regulating judicial proceedings."

Art. 2981. "The judicial sequestration is confided to the "public officer whom the law provides to execute the orders "of the judge."

"This officer is subject to all the obligations imposed in "the case of conventional sequestration."

Art. 2963. "The only real deposit is that, where the "depositary receives a thing to be preserved in kind, *without* "*the power of using it*, and on the condition that he restore the identical object."

Art. 2940. "*The depositary cannot make use of the thing* "*deposited, without the express or implied permission of the* "*depositor*."

Art. 2942. "If the things deposited be animals, the "depositary may employ them, *for the benefit of the depositor*, "unless the latter has directed otherwise."

Art. 2948. "If the thing deposited has been productive.

" and the proceeds have been received by the depositary, he " is bound to restore them."

2 Rob., 153. Bank of Alabama *vs.* Hozey: " A seques- " tration conventional or judicial *creates no privilege. It is* " *merely a conservative measure in the nature of a deposit.* The " sequestrator's possession is that of the party legally entitled " to it, and *the rights of neither party on the property are affected*; " the owner's title is not divested, and *the creditor acquires no* " *greater* right than he had before."

When Neafie & Levy gave bond to the sheriff, and obtained the release and possession of the tug, they stepped into his shoes, having no more right to *use* the tug or to profit by her revenues than he had.

It follows that, if the defendant, whether pretending to act as the agent of Neafie & Levy or otherwise, put the vessel to use, or made her part of an association, for profit, he did so with full knowledge that no such right existed in favor of his principals, and he, equally with them, is accountable for whatever money she earned.

It is found as a fact that the tug was in active use from October 25th to December 29th, 1877; that out of the earnings of the partnership formed with her and the two tugs of this defendant, she earned $4028.53 out of $7815, the gross earnings of the three boats,—of which the defendant "*accounted for*" to Neafie & Levy but $2605. That this tug earned considerable more in the partnership than the other two tugs together gives plausibility, at least, to the charge in the libel (p. 2) " that the services to which the said steamtug was put " . . were of the severest kind, and such as would and did " cause extraordinary tear and damage and destruction to " said tug."

Ewell's Evans on Agency (marginal p. 36):

" There can be no delegation of the performance of an " illegal act."

P. 213. " The duty of an agent to obey his instructions " and observe the terms of his authority, is qualified by the " operation of certain well known principles of law. They are " as follows:

" 1. When the authority or instructions require him to " do an illegal or immoral act, he will not be justified in doing " such act."

. . . . . .

P. 329. "The rule is that an agent is personally liable to "third parties for doing something which he ought not to "have done." . . . . . .

"An agent is personally liable to third parties if, when "employed to sell, he sells after notice that the property does "not belong to his principal. . . . If the agent is a tort-"feasor he will be personally liable. . . . . .

. . . . . .

"The authorities show that the doctrine that the posses-"sion of an agent is the possession of principal, has no "application to the act of the wrong-doer.

. . . . . .

"No person will be allowed to excuse himself on the "ground that he acted as agent or as the servant of another; "for the contract of agency or of service cannot impose any "obligation on the agent or servant to commit or assist in "committing a fraud," (or any illegal act.)

Story on Agency, 4th ed., par. 311. "In the next place, "as to the liability of *agents* to third persons, for their own "malfeasances and positive wrongs. In all such cases, the "agent is personally responsible, whether he did the wrong "intentionally, or ignorantly, by authority of his principal; "for the principal could not confer on him any authority to "commit a tort upon the rights or property of another." . .

Par. 312. "*A fortiori*, if the principal is a wrong-doer, "the agent, however innocent in intention, who participates "in his acts, is a wrong-doer, also; . . . . for a person is "guilty of a conversion, who intermeddles with the property "of another, without due authority from the true owner; "and it is no answer that he acted as an agent, under the "authority of a person, supposed at the time to be entitled as "the owner."

Beyond question, the defendant did use the tug for his own benefit and profit from the date of her release, till she was put into the "Association" of towboats in December. She was run in the towing business, in conjunction with his own boats, did considerably more work than both of them,—but was allowed by him but one-third of the earnings of the three.

It is not pretended that Neafie & Levy have accounted to or credited the libellant for the earnings of the tug, while in

their possession or under seizure, or that they intend to. On the contrary, it is claimed, and the Court so, in substance, finds, that Neafie & Levy and the defendant may have, and not account for, these earnings and revenues. One of the conclusions of law of which complaint is now made is that Neafie & Levy were lawfully in *control* [meaning with right to use, without accounting] of the steamtug in question.

They, or their agent, could have no greater right than the Court's officer, the sheriff, who, if the earnings had come into his hands, could have disposed of them only under the execution that subsequently came into his hands, or by paying them to the tug's owner.

Indeed, as to revenues of the tug, from the time she was returned to the sheriff, he was the only person legally capacitated to receive them. (Art. 2948, C. C. already quoted.) The defendant was an intermeddler in touching them.

It is, therefore, submitted that Neafie & Levy were not lawfully *in control* of the steam tug "C. C. Keyser," at any time; that the defendant *is* liable to account to libellant for the wrongful use and for the earnings of his tug; and that the libel should not have been dismissed.

The Court has found that, as between the defendant and Neafie & Levy, certain accounts have been rendered. The Court has not found the state of accounts, *as between the defendant and the libellant*, in case it should appear that the libellant's claim is well founded.

In the latter case, many hundred dollars charged by defendants, as between him and Neafie & Levy, as commissions, (see pp. 17, 18, 30,) would *not* be lawful charges as between him and libellant. The same may be said of charges for insurance and other charges, which would result in material alteration of the figures, (set forth in the 9th and 10th of the findings of facts.) The correct figures could be determined only by remanding the case for that purpose, should the position of appellant be sustained.

Respectfully submitted,

R. H. MARR,
of Counsel for Appellant.

119-6 CR

# UNITED STATES SUPREME COURT.

No. 71.

ALBERT BALDWIN,

SUBROGATED FOR

J. C. KEYSER

*vs.*

JOHN W. BLACK.

*Brief for Defendant and Appellee.*

HENRY C. MILLER,
*Proctor for defendant.*

L. GRAHAM & SON, PRINTERS, 101 GRAVIER ST., N. O.

# UNITED STATES SUPREME COURT.

No. 71.

ALBERT BALDWIN,

SUBROGATED FOR

J. C. KEYSER

*vs.*

JOHN W. BLACK.

*Brief for Defendant and Appellee.*

STATEMENT OF THE PLEADINGS AND OF THE FACTS.

On the 7th May, 1878, Joseph C. Keyser filed a libel in personam in the United States District Court for the Eastern District of Louisiana, claiming a decree against John W. Black, the defendant, for twenty-five thousand dollars. The ground of liability stated in the libel is that the defendant illegally took possession of and used the steam tug J. C. Keyser, the property of the libelant, and that the value of the said use and services of the tug was fully $25;000, which the libel seeks to recover from the defendant. Subsequently, the libelant transfered his claim against defendant to Albert Baldwin.

See the libel, p. 1-9.

The defence to the libel is, that the tug was seized under a writ of sequestration, one of the conservatory writs allowed before judgment by the laws of Louisiana, in suits for the enforcement of debts. (See Louisiana Code of Practice, Art. 269.) the seizure having been made at the suit of Neafie and Levy of Philadelphia, creditors of the defendant, Keyser, for a large amount secured by mortgages on the tug, that in that suit in accordance with the laws of Louisiana, the tug had been on the application of Neafie and Levy, the seizing creditors released from seizure and delivered to them on their release bond, and that Black, the defendant in the libel, sought to be charged as a trespasser, taking possession of the tug without right, in fact received, held and used the tug for his principals Neafie and Levy, whose possession anduse of the tug under the release bond was accorded to them by law and the order of the competent Court. The condition of the release bond under the Louisiana law (Louisiana Code of Practice, Articles 279, 280, printed in the appendix to this brief,) is that the party, whether plaintiff or defendant, obtaining possession under the release bond will not send the property out of the jurisdiction of the Court or make any improper use of it, and that he will faithfully restore it after definitive judgment, in case he be decreed to restore it. The answer further avers that in the sequestration suit Neafie and Levy, the plaintiffs therein, recovered judgment against Keyser, the defendant, for the amount of their debt, with recognition of their mortgage on the tug, that they surrendered the tug to be sold under that judgment: that execu-

tion issued and that the tug was bought by them at the sheriff's sale. The answer thus exhibits that the possession and use of the tug by Black, the defendant's agent, stated by plaintiff to have been an illegal use and possession, was at all times a lawful possession and use for his principals, Neafie and Levy, under their release bond, followed by a definitive judgment in their favor decreeing their right upon the tug, under which judgment they bought the tug. The answer further avers that Neafie and Levy paid a large amount of debts created by Keyser, secured by privileges and liens on the tug, having priority over the debt of Neafie and Levy, and that by these payments Neafie and Levy became subrogated to the rights of these lien and privilege creditors against Keyser and against the tug, thus increasing the debt due to them. The answers show that crediting Keyser on his debt to Neafie and Levy, with the full amount of the sale of the tug, he still is in their debt to a large amount and in this posture of things he brings this suit against their agent Black, upon the pretended ground of trespass committed, or some liability incurred by him in exercising for his principals their legal right to the use and possession of the tug. See Answers, Rec. 3, p. 6.

The decree of the United States Circuit Court was in favor of the defendant and appellee. The Court found the facts as follows:

This cause came on to be heard on the record and evidence, and was argued, whereupon the Court finds the following as the facts of the case:

1st. That in October, 1877, Neafie and Levy, of Philadelphia, were creditors of J. C. Keyser, the libel

ant herein, for eighteen thousand one hundred and sixty-four dollars, with interest from ——, 18—, for which amount they had a mortgage upon the steamtug C. C. Keyser, the debt being for the price of the tug built by them for Keyser.

2nd. That on the 11th of October, 1877, they begun suit in the Third District Court for the Parish of Orleans, to collect said debt; in accordance with the law, sequestered the tug C. C. Keyser; in due course recovered judgment against J. C. Keyser, the libellant, for the full amount of their debt with interest; issued execution against him; sold the tug under the execution, the judgment recognizing their mortgage; the tug was sold for sixteen thousand and seventy-five dollars; was purchased by said Neafie and Levy, the amount credited up on their debt, and there remained due to them by J. C. Keyser on the judgment, after giving him credit for all that was made on the execution, the sum of three thousand three hundred and eighty-seven dollars, with interest, which is still due.

3rd. That pending said suit of Neafie and Levy, against J. C. Keyser, the tug not having been bonded by him, after the lapse of the ten days allowed by law to bond, the said Neafie and Levy bonded the tug, and accordingly the said tug was delivered under the order of the Court into their possession and said release bond was by them furnished, under and in accordance with the 279th and 280th article of the Code of Pactice and that John W. Black, the defendant herein, was the surety of Neafie and Levy upon the release bond, and was their agent here to receive and hold possession of said tug-boat, and under the order of release did receive and hold possession of them accordingly.

4th. That the tug was held under the release bond by Neafie and Levy, through the defendant as their agent, from 25th October, 1877, to the 10th January, 1878, on which date the tug was returned to the custody of the sheriff, held by him under the writ of sequestration, on the suit of Neafie and Levy *vs.* J. C.

Keyser. until the 6th of May, 1878, when the tug was sold under execution. issued in said suit, to satisfy the judgment therein, Neafie and Levy becoming the purchasers, as already stated.

5th. That during part of the period the tug was held by defendant, as agent of Neafie and Levy, under the release bond—that is, from 25th October, 1877, to 29th December, 1877—the tug was in actual use, being employed in the business of towing vessels—first, in conjunction with two other tow-boats owned by the defendant, to wit, the Mary Lee and Greyhound, the three forming the Anchor Line of tow-boats, and afterwards the tug was employed in towing, in conjunction with other two boats, forming the Associated Line, but from the 29th December, 1877, no use was made of the tug whatever; she was returned to the possession of the sheriff [and] held by him under the writ of *sequestration* and execution until sold by him under the execution.

6th. That the use made by Black of the tug, as stated, was with the authority and under the directions of his principals, Neafie and Levy, to whom he accounted for all the earnings of the tug, and the defendant acted throughout, in becoming surety on the release bond, receiving, holding, and using the tug, as agent for Neafie and Levy.

7th. That for the period from the date of the release of the tug, October 25th, 1877, the tug being employed in the business of towing as one of the Anchor Line, the three boats working together, one bringing vessels in from the sea, the other two towing up and down the river, the earnings of the three boats were pooled, and of the joint earnings the tug C. C. Keyser was allowed and earned as her share of the gross earnings, twenty-six hundred and five ($2,605) dollars; that from the 1st to 29th of December, 1877, the tug was placed by defendant in the associated line of tow-boats, composed of all the tow-boats, was used in conjunction with the tow-boats of the line, and earned and was allowed the sum of twenty-two hun-

dred and one 86-100 dollars, gross earnings as her share of the pooled receipts of all the tow-boats of said lines.

8th. That although the tug was not used at all after 29th December, 1877—was in the hands of the sheriff from 10th January, 1878, to date of the sale under the execution—yet, having been placed in the associated lines of tow-boats by defendant, as agent of Neafie and Levy, under the rules of which lines, tow-boats placed therein were allowed their share of the earnings whether used or not, the defendant received from the association lines, as accruing to the tug under the rules, $2,794.26, $1,765.60, $2,109.26, $332.52, $2,201.86.

9th. All these sums earned or allowed the tug were carried into the account between the defendant and Neafie and Levy. They, Neafie and Levy, were charged with the expenses, coal, wages, supplies, and other disbursements incident to the employment of the tug, and there resulted the following net credits to Neafie and Levy from all the sums earned by the tug C. C. Keyser or allowed to her from the associated lines when not used at all: $1422.72, $832.50, and $332.52, aggregating $2,588.88, which was paid to his principals, Neafie and Levy, by the defendant, as derived by him in the manner stated for and on account of the tug.

10th. While the tugboat Keyser was in the possession of and employed by the defendant Black, as aforesaid, the actual work done by the boat, as shown by the log (and disregarding pool with Anchor Line) for the month of November, amounted to $4029.53, and the earnings for the month of December, as shown by the pool account, amounted to $2201.86, making a total of 6231.39 as the actual earnings of said tug; all of which came into the hands of defendant Black as agent as aforesaid, and that during the actual use of said tug as aforesaid the expense of running amounted to the sum of $4428.97, made up of the following items:

| | |
|---|---|
| Undisputed expense | $2587 83 |
| Insurance | 120 00 |
| Coal consumed | 1419 58 |
| Commission on $6231.39 | 311 56 |

All of which were paid by defendant Black, as agent as aforesaid.

11th. When the tug was seized by Neafie & Levy under their mortgage she was encumbered with the following lien and privileged debts:

| | |
|---|---|
| B. D. Wood & Bro., for cash | $2,281 40 |
| Geo. W. Adams, master, and crew, for wages | 971 02 |
| To Woodward & Wight, for supplies | 944 75 |
| To Brown & Jones, for coal | 291 00 |
| Aggregating | $4,488 17 |

All of which privileged debts taking precedence of Neafie & Levy's mortgage were paid by them under subrogations, legal as well as express, to the rights of these lien and privilege creditors. All these lien and privileged debts were created by the libellant Keyser, and were his debts discharged by Neafie & Levy. These payments by Neafie & Levy were all made from the date of the seizure of the tug under their sequestration to the day of the sheriff's sale to them.

And thereupon the Court finds the following conclusions of law:

1st The defendant Black was lawfully in possession of the tug-boat Keyser as the agent of Neafie & Levy, who were lawfully in control of the same under the order of a Court of competent jurisdiction.

2nd. There was no liability on the part of Black, *ex contractu* or *ex delicto*, to account to libelant for the use or earnings of said tug-boat.

3rd. The libel should be dismissed with costs.

Considering the aforesaid findings of fact and conclusions of law, it is ordered, adjudged and decreed that the libel in this case be dismissed, and that the libelant pay the costs in this and in the District Court.

Rec. 28 to 30.

DON. A. PARDEE,
*Circuit Judge.*

In cases where property is seized under the writ of sequestration, the law of Louisiana gives to the defendant the first right to bond, and if he does not exercise his right, the law permits the plaintiff to bond. See Louisiana Code of Practice, Articles 279, 280, printed in appendix. It was under these articles and under the order of the Court, that Neafie & Levy, the plaintiff in the sequestration suit, bonded the tug. The possession and use of the tug by the defendant Black, was their possession and use, and their possession and use was lawful under their release bond.

Nor did Neafie & Levy, or their agent Black, incur the least liability to Keyser, under the release bond. Nor could such a liability, if it existed arising from a lawful possession and use of the tug, could he redressed by a libel in admiralty, charging a maritime tort or contract. The condition of the release bond is, that the plaintiff or defendant bonding the property, will not make an improper use of it, nor send it out of the jurisdiction, and will present the property, if decreed to restore it. (See the articles cited.) Neafie & Levy were creditors of their debtor, Keyser, with nothing but this tug to rely on for satisfaction of their large debt. It was natural and proper they should exercise their right to bond the tug and make such use of it, as they could, instead of letting the tug lie idle in the hands of the sheriff, or in their own hands, depreciating from disuse and expenses of keeping. The law permitted them to use the tug, if not an improper use, and the finding is that the tug was used in towing, the proper use for such a vessel. Nor

were Neafie & Levy condemned to restore the property. On the contrary, the judgment in the sequestration suit was in their favor for their debt, with right of mortgage. Under their judgment decreeing their right on the tug., the tug was seized and sold under their execution and bought by them for a sum less than their mortgage debt. (See the finding, paragraphs No. 1 to 6, Rec., pp. 28-29.) It follows then, that, under the law and their release bond, neither Neafie and Levy or their agent Black were under any obligation to Keyser, the libellant here, for the use they made of the tug. The bond permitted them to use the tug, without imposingany liability arising out of that use. The only obligation the law imposed was that they should surrender the property if decreed to restore it to Keyser, and it was never decreed to be restored.

There is another view. The finding of facts shows, the liability of Keyser to Neafie and Levy, left unsatisfied by the sale of the tug under their execution, and arising out of the payment by them of the debts privileged on the tug, created by their debtor Keyser These privileged debts ranked the mortgage of Neafie and Levy; they had to pay them to protect their mortgage right, and the law as well as express stipulation, subrogated them to the rights of the creditors they paid. See Civil Code of Louisiana, Articles 1602, Par. 1; 2161, Par. 1.

Keyser owed Neafie & Levy a balance on their mortgage debt unsatisfied by the execution sale of three thousand three hundred and eighty-seven dollars with interest, and the privileged debts paid by

them amounted to four thousand four hundred and eighty-eight $\frac{17}{100}$ dollars, aggregating an indebtedness of Keyser to Neafie & Levy of seven thousand eight hundred and seventy-five dollars. See the 2d and 11th paragraphs of the finding. Rec. pp. 28 and 30 Against this large indebtedness the net earnings of the tug for the entire period, she was in use was eighteen hundred and two $\frac{42}{100}$ dollars.

| | | |
|---|---|---|
| Work for month of November, 1877, ... | $ 4,029 | 53 |
| Work for December, 1877, ..... | 2,201 | 86 |
| | 6,231 | 39 |
| Less, expenses for same period ..... | 4,428 | 97 |
| | $ 1,802 | 42 |

But as the tug was employed in towing, in conjunction with other tugs under a system of pooling and dividing earnings equally among all the associated tugs, irrespective of the actual work they performed, there was awarded to Keyser for Nov., 1877, only $2605 instead of $4029.53. So adjusting her earnings on the basis of the amount awarded, reduces her actual earnings to $377.89, thus:

| | | |
|---|---|---|
| Work for November, 1877 ..... | $ 2605 | 00 |
| Work for December, 1877..... | 2201 | 86 |
| | $ 4806 | 86 |
| Less expenses..... | 4428 | 97 |
| | $ 377 | 89. |

See the 7th and 10th paragraphs of the finding. Rec. pp. 29-30.

Besides the earnings of the tug for actual services, as Black the defendant placed her in the tug-boat as-

sociation, under rules which allowed the tug whether used or not, to participate in the earnings, he was enabled to secure for his principals, Neafie and Levy amounts awarded to the tug after her actual use had ceased, and for a period when she was in the Sheriff hands awaiting the sale under execution. The amounts thus awarded the tug were $2790.26 $1765 60, $2109.26, $332.52, aggregating $6997.62, (see finding, 8th paragraph.) Adding $6977.62 to $377.89 net earnings in actual use, aggregates $7375.17. The tug was in actual use under the bond from October 25, 1877, to December 29, 1877. The residue of the period, say, from January to May 10th, 1878, when she was sold under the execution, she was on defendant's hands, idle and under expenses, and for the greater part of the time in the custody of the sheriff. Of all the sums derived from the tug by the defendant Black, for his principals, Neafie & Levy, the net amounts derived by them was two thousand five hundred and eighty-eight $\frac{88}{100}$ dollars, (See the 10th paragraph of the finding, Rec. 29. All these amounts for actual use and those awarded the tug, come into the hands Black, the defendant, for his principals, Neafie & Levy, were carried into the account between him and his principals and the net proceeds, $2588.68, paid by him over to them. See the finding 9th and 10th paragraps, Rec. p. 30. And even if Black had not paid them over, that would be a matter between him and his principals, about which the debtor, Keyser, would have no concern. So then, if any liability existed on the part of

Neafie & Levy or of their agent, Black, for earnings of this tug, the account would stand thus:

| | |
|---|---|
| His debt to Neafie & Levy, unsatisfied by the execution sale, and still due, is..... | $ 3387 00 |
| Amount privileged debt, paid by Neafie & Levy, still due them ..... | 4488 17 |
| | $7875 17 |

Amount earnings, actual and constructive, $7375.17, but netting only $2588.68.

Thus, if any liability existed for the earning of the tug, that liability ia extinguished by the greater debt due to Neafie and Levy by Keyser. See Civil Code, Article 2207, *at s. e* q. In any issue on this subject that Keyser might have provoked in the State Court, that court would have adjudged that he had no claim whatever for earnings of the tug, either under the law or under the facts, That must be the conclusion here. It is simply monstrous for him to seek a decree against Black, the agent of Neafie and Levy, for the use of the tug by him as their agent, when that use was lawful, created no liability to Keyser, and when over and above all amounts derived for the use of the tug, he is still largely their debtor.

It may be said, too, that the libellant exhibits no case of admiralty jurisdiction. He cannot transform lawful possession of the tug into a maritime tort, and there is surely no maritime contract, express or implied. There was no jurisdiction of the libellants' demand, in the U. S. District Court and so insisted the exception

of the defendant. See exception and answer, Rec. p. 3.

The conclusion of the U. S. Circuit Court was: 1st, the defendant, Black, was lawfully in possession of the tug Keyser as agent of Neafie & Levy, who were lawfully in control of the same under the order of a court of competent jurisdiction.

2d. There was no liability on the part of Black, *ex contractu* or *ex delicto* for the use of the tug.

3d. The libel should be dismissed Rec., p. 30.

That decree, it is respectfully submitted, should be affirmed.

Respectfully submitted,

HENRY C. MILLER,

*Proctor for defendant.*

APPENDIX.

ART. 279. A defendant against whom a mandate of sequestration has been obtained, except in cases of failure, may have the same set aside by executing his obligation in favor of the sheriff, with one good and solvent surety for whatever amount the judge may determine, as being equal to the value of the property to be left in his possesion.

And whenever the defendant shall fail or neglect to execute such obligation, in the manner prescribed, within ten days after the seizure of the property by the sheriff, then it shall be lawful for the plaintiff, his agent or attorney in fact, to give similar bond and security to the sheriff as that required by law from the defendant, and to take the property sequestered into his possesion.

ART. 280. The security thus given by the defendant, when the property sequestered consists in movables, shall be responsible that he shall not send away the same out of the jurisdiction of the court; that he shall not make an improper use of them; and that he will faithfully present them, after definitive judgment, in case he should be decreed to restore the same to the plaintiff.

119-623

# UNITED STATES SUPREME COURT.

No.

J. C. KEYSER

*vs.*

JOHN W. BLACK.

*Supplemental Brief for Defendant and Appellee.*

HENRY C. MILLER,
*Proctor for defendant.*

L. GRAHAM & SON, PRINTERS, 101 GRAVIER ST., N. O.

# UNITED STATES SUPREME COURT.

No.

J. C. KEYSER

*vs.*

JOHN W. BLACK.

*Supplemental Brief for Defendant and Appellee.*

The brief of the defendant, the appellee here, was filed in this Court in advance of the brief of the libellant, the appellant.

In the brief filed on behalf of the appellant it is contended that a party obtaining possession, under a release bond, of property sequestered, has no right to use the property. The appellant seeks support for this position in the articles of the Civil Code referring to the obligations of a depositary or bailee. See Civil Code of 1870, Articles 2926, 2927, 2940, 2982, 2964, 2972, *et seq.* But manifestly these articles of the Code, have no application to the obligations of the party, who receives the property sequestered under the release bond. The law under which he bonds and the bond itself, furnishes the measure of his obligation and the obligation of his surety. The condition imposed by the law and the bond in respect to the use, is, that

no improper use shall be made of the thing, and that if decreed to restore the thing it will be presented. See the Code of Practice, Arts. 279, 280. The law thus recognizes that a proper use of the thing can be made while it is held under the release bond. Indeed, vessels are especially apt to depreciate if not used. On the theory advanced by the libellant, the object of bonding vessels sequestered would be defeated. The vessel would go to decay, and be eaten up with expenses of keeping, if not bonded, but left in the sheriff's hands to await the end of a tedious litigation. If bonded, the libellant contends the vessel must still be kept idle under heavy charges and depreciating daily from disuse and accumulated expenses. The maxim that "vessels were made to plow the ocean, and not rot by the wall" doubtless dictated the legislative policy expressed in the articles of the Code of Practice, authorizing the release of property sequestered. It is only the improper use of the vessel held under the release bond, that is forbidden. In this suit the libel itself charges as the ground of liability, that the use made of the vessel was of the "severest kind, such as would cause extraordinary wear, damage and destruction to the tug." But the finding was against the libellant on this point. It is the necessary conclusion from the finding, that the vessel was not in the least injured, that the use was proper and that the vessel was in as good condition when returned as when released. It is a fair inference—she was in a better condition. He cannot then say the vessel was injured. He surely cannot find ground for complaint because his creditors, Neafie and Levy, were enabled by the proper use of

the tug to obtain some revenue, and to that extent diminish their loss in the effort to obtain payment of his debt to them. With all that was derived from the use of the tug, they are still his creditors. It is submitted that the reason, and the letter of the law repell the libellant's proposition that the tug could not be used while held under the bond. No line of the Code sustains that position, and no Louisiana decision gives it the least countenance. On the contrary, the law and the bond, authorized the use that was made of the tug.

In the libellant's brief it is said the tug was ostensibly returned to the sheriff. Why ostensibly? She had to be returned to the sheriff, to abide the judgment in the suit. If the decree had been against Neafie and Levy the tug would have been delivered to the libellant. As it was, the decree was in favor of Neafie and Levy, and she was sold under the execution. The finding is she was returned to the sheriff, and sold under the suit of Neafie and Levy.

If the libellant, Keyser, had the right to claim the earnings of the tug while held under the release bond, his claim would be against Neafie and Levy. They were the principals in the release bond. The possession of Black, whom the libellant chooses to sue, was the lawful possession of his principals, Neafie and Levy. If therefore he can claim these earnings he is confronted with his much larger debt still due to Neafie and Levy. The claim for earnings if well founded on his part, would be extinguished, and compensated by his larger debt to Neafie and Levy. See Civil Code, Articles 2207-2208. Is that result to be

evaded by directing his suit against Black, the agent of Neafie and Levy, and charging him with an unlawful use and possession of the tug, when that use and possession was the lawful exercise of Black's, agency for the libellant's creditors, whom he still owes.

There is not the remotest ground on which to remand this case, as is suggested by the libellant. The finding is complete. The facts and law, it is respectfully submitted are with the defendants and appellee and the decree should be affirmed.

HENRY C. MILLER,
*Proctor for defendant.*